

Exhibit 2

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 09-50026-reg

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5 In the Matter of:

6 MOTORS LIQUIDATION COMPANY, et al.,

7 f/k/a General Motors Corp., et al.

8

9 Debtors.

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13 U.S. Bankruptcy Court

14 One Bowling Green

15 New York, New York 10004

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18 February 17, 2015

19 9:02 AM

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21 B E F O R E :

22 HON ROBERT E. GERBER

23 U.S. BANKRUPTCY JUDGE

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25 ECRO: K. HARRIS

1 Hearing re: Oral Argument on Motion to Enforce.

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 THE COURT: Good morning. Have seats, please.

3 Well, I know everybody who's likely to speak. So, let me
4 just get appearances of those who will be heard for the
5 transcript. And then I want you all to sit down, because
6 I'm going to have some preliminary comments.

7 MR. STEINBERG: Arthur Steinberg, from King &
8 Spalding, on behalf of New General Motors.

9 THE COURT: All right, Mr. Steinberg. Could
10 everybody hear me? I'm not sure if I have the same volume
11 in my mic that I normally do. Can you hear me, Mr. Flaxer?

12 MR. FLAXER: (indiscernible)

13 THE COURT: Okay. Thank you.

14 MR. WEISFELNER: Good morning, Judge. Edward
15 Weisfelner, Brown Rudnick, on behalf of the designated
16 counsel.

17 THE COURT: Thank you, Mr. Weisfelner.

18 MR. WEINTRAUB: So, good morning, your Honor.
19 William Weintraub with Goodwin Procter, also designated
20 counsel.

21 THE COURT: Right, Mr. Weintraub.

22 MS. RUBIN: Morning, your Honor. I'm Lisa Rubin
23 with Gibbs & Dunn on behalf of the GUC Trust.

24 THE COURT: Okay. She was kind of far from the
25 mic; that was Ms. Rubin introducing herself for the GUC

1 Trust. I got it this time, Ms. Rubin.

2 MS. NEWMAN: Good morning, your Honor. Deborah
3 Newman from Akin Gump on behalf of the participating note
4 holders.

5 THE COURT: All right, Ms. Newman.

6 MR. ESSERMAN: Good morning, your Honor. Sander
7 Esserman, Stutzman, Bromberg, Esserman & Plifka on behalf of
8 designated counsel.

9 THE COURT: All right. And I see Mr. Flaxer right
10 next to you, Mr. Esserman.

11 MR. FLAXER: Yes, your Honor, only to the extent
12 that we feel that it's necessary to speak for -- it could be
13 a minute or two would be it.

14 THE COURT: All right, very good. Thank you. All
15 right, folks. With one exception, I want you to make your
16 presentations as you see fit. But before you're done, I'd
17 like you to address a fair number of questions that had
18 occurred to me when I was reading the briefs. These
19 questions (indiscernible) one or another of you, or, in many
20 cases, both.

21 But first, the exception, mainly Mr. Weisfelner
22 and Mr. Weintraub: you folks spend many, many pages in your
23 briefs talking about the underlying failures of Old GM and
24 New GM to institute the necessary recalls on the cars and
25 the 24 or 25 people at Old GM who knew enough to justify

1 much, much larger recalls. I get it. But that's not what's
2 before me now.

3 I'm prepared to assume, for the purposes of this
4 controversy, unless Mr. Steinberg really wants to dispute
5 it, that there was enough to require a recall well before
6 June 2009, and that each of Old GM and New GM acted very
7 badly in connection with the delay. But I want to focus on
8 the legal issues. So, let's turn to them.

9 Starting with due process, Mr. Steinberg, one
10 would assume, I think, that a company's books and records,
11 if they're to determine whether a claim is known or unknown,
12 have to be much more broadly construed than in the financial
13 statement sense. And I take it that you're not arguing that
14 whether or not a creditor is known or unknown turns on
15 whether the company has booked the liability.

16 So, before you're done, I'd like you to tell me:
17 how would you articulate the standard? I wonder whether the
18 standard should be more than foreseeable but less than
19 probable. But I would like you to put forward your view as
20 to how I should construe that. It's debatable whether
21 potential liabilities associated with the ignition switches
22 were wholly (indiscernible) claims, even if Fritz Henderson
23 and Mary Barra didn't know about them.

24 But I take it you'll agree that Old GM knew enough
25 to send out recall notices back in 2009. Their people would

1 have known that there was something potentially wrong with
2 their cars. And those who weren't in wrecks could have
3 filed claims or objected, as they're doing now, at the time
4 of the 363 sale. If recall notices had been issued,
5 wouldn't the publication notice that was given then be more
6 justifiable?

7 Number two: by the same token, Mr. Weisfelner,
8 would you clarify your position on what notice should have
9 been given? I gather the parties have stipulated that there
10 were 70 million GM cars then on the road. I gather also
11 that there were approximately 27 million whose cars, we're
12 learning, later became the subject of pending recalls.

13 It'd be helpful if you would tell me how many of
14 those 27 million cars were then subject to announced recalls
15 and how many would have been subject to recalls if GM, which
16 was then Old GM, of course, had announced them as it should
17 have. Seemingly, the number would be very, very large.

18 Now, again, Mr. Weisfelner, is it your argument
19 that mailings should have gone out to each owner, each of
20 those 70 million, in the period between the June 1st, 2009,
21 filing of the bankruptcy and the June 30, 2009, date for the
22 start of the sale lien? Or, for that matter, the June 19
23 date, which was the deadline for objections in the 363 sale?
24 Or are you saying it should have gone out by mail only to
25 cars with the poorly designed ignition switches?

1 Both sides: what information do I have in the
2 record on how much it would cost to send out mailing notices
3 to all 70 million of the GM cars on the road at the time, or
4 even 27 million cars? And what information do I have in the
5 record on how much time it would take to send out 27 or 70
6 million notices?

7 Mr. Weisfelner, I made a factual finding back at
8 the hearing on the same issue, that the continued
9 availability of the financing Old GM was using to survive at
10 the time was conditioned on approval of the 363 sale motion
11 by July 10. And I also rejected an argument that was made
12 by bondholders at the time that the government's July 10
13 deadline was just posturing and that I should have argued --
14 I should have found back then, or assumed back then, that
15 the U.S. government cared so much about GM's survival that
16 the U.S. government would never let GM die.

17 Well, that seems to have a lot of similarities to
18 (indiscernible) you make now. On that, I know your clients
19 weren't present back then to argue to the contrary, but to
20 challenge -- or to challenge those findings. But others
21 did. Are you challenging those findings now? Do you think
22 there are some facts now to suggest that I should now find
23 that the government was posturing, while you'd rejected that
24 contention back in 2009?

25 I don't know if I'm going to hear from the GUC

1 Trust in the first phase of the arguments. But, at some
2 point, Ms. Rubin, when you do get the chance to be heard,
3 which you will sooner or later, I'd like you to help me with
4 this: the cost of administration of the Chapter 11 case,
5 which would at least seemingly include the cost of mailing,
6 would come directly out of the pockets of your folks, the
7 unsecured creditor constituency.

8 How do you think a judge should decide what's
9 reasonable in sending out notice of a 363 sale to a universe
10 of potential creditors when it comes out of the pockets of
11 those who you know are creditors for absolutely, positively
12 sure, like your bondholders, like your vendors in the supply
13 chain, and victims of car wrecks, people who were actually
14 in accidents who got injured or killed when cars didn't
15 perform the way they were supposed to?

16 Back to you, Mr. Weisfelner: what would the
17 notice have said, if GM were to do it right, and you say
18 that GM didn't do it right? As I think it was Judge
19 Bernstein said in Chrysler -- I think by then it had been
20 named New Car Co., or maybe Old Car Co., "Things can go
21 wrong with cars all the time. And, while design defects
22 that can cause a loss in cars' value don't happen all the
23 time, or all that often, I don't know if anybody could
24 really say they're infrequent." So, what do you think would
25 have been reasonable under the circumstances?

1 Both sides: is it appropriate to be making
2 distinctions, when we're talking about honoring claims --
3 and I'm offering you a view now as to whether there are --
4 these are unknown claims as a (indiscernible) or not --
5 between liquidating 11s and 11s where there is a surviving
6 entity, we all know that there's no discharge in a
7 liquidating 11. There is, of course, a discharge in the 11
8 where a company survives.

9 A lot, and maybe most, of the case law
10 (indiscernible) you rely on is in the context of expunging
11 claims, either because they're late or because they've been
12 discharged. But it's a lot easier to say that a claim isn't
13 discharged when we have a debtor that's surviving and you
14 can still go after that debtor by ignoring or blowing away
15 the order that protected the debtor upon the confirmation of
16 the case or otherwise.

17 Both sides: shouldn't we focus on the
18 distinctions between the notice that's appropriate in a 363
19 sale on the one hand and the notice that's required to give
20 parties a chance to file claims on the other? Or, to the
21 extent that it's different, the notice that needs to be
22 given before a judge discharges a creditor's claim? And
23 isn't it necessary or appropriate to take into account the
24 time exigencies inherent in many, perhaps most, 363 sales,
25 especially those, like most of them, where the debtor only

1 has the cash to survive for only days or weeks?

2 If reasonableness depends on the facts and
3 circumstances, as the Supreme Court said in (indiscernible),
4 wouldn't it be appropriate to take into account that, in the
5 363 context, you have to hold a hearing on a sale in four
6 weeks, because you're bleeding so badly that you can't
7 survive any longer?

8 Mr. Steinberg: you point out that New GM didn't
9 yet exist when notice was given, and that it was Old GM that
10 was responsible for the failure to give the creditor
11 community a notice. But does that matter? Or should a
12 judge simply focus on whether or not the creditor was given
13 appropriate notice, no matter who's responsible for it or
14 for the failure to provide it, and then the extent to which
15 the outcome would have been different if appropriate notice
16 had been given?

17 Both Mr. Steinberg and Ms. Rubin, back to you. I
18 haven't forgotten about you, Ms. Rubin. Let's assume that I
19 agree with Mr. Steinberg that it wasn't practical to send
20 out mailed notice to the 70 million or even 27 million car
21 owners for the 19 days that they'd have to object to the 363
22 sale. But isn't it inexcusable for Old GM to have denied
23 people whose cars were subject to recalls notice of the bar
24 date for filing claims?

25 And even if Old GM thereto -- that is, in the bar

1 date context as in the 363 context -- wasn't going to give
2 the 70 million or 27 million people mailed notice, I have
3 some trouble seeing how they could have responded to the bar
4 date notice and filed claims when Old GM still hadn't sent
5 out the recall notices as of the bar date, when at least
6 seemingly, if not apparently, there wasn't the same degree
7 of urgency.

8 Now, both sides -- and here I mean Mr. Weisfelner
9 and Mr. Steinberg -- on remedy, assuming I find violations
10 of due process, I have problems with aspects of each of your
11 positions. Mr. Weisfelner, let's turn first to what you're
12 asking for. I gather -- and I think you said it expressly -
13 - that you're not asking me to vacate the entire sale order.
14 In fact, I gather that you aren't even asking me to vacate
15 it, even in part.

16 It seems to me that you're saying, "Fine, enforce
17 it against everyone else. Just don't enforce it against me,
18 or me and my guys." Is that an unfair characterization of
19 your position?

20 Both sides: finding a due process violation may
21 not by itself require a showing of prejudice. But isn't the
22 prejudice critical to determining whether there's a remedy
23 for it? I'm inclined to agree with Mr. Weisfelner that
24 finding a due process violation does not by itself turn on
25 prejudice, but it seems to me that the remedy for it

1 necessarily must. The issue, it seems to me, is: what
2 should a Court do about the situation when it finds that
3 there's been a violation of due process?

4 And here, I'm going to ask you guys to address
5 when the standards are the same when you have a bipolar
6 dispute, or a modestly polar dispute, which is typical in a
7 (indiscernible) litigation, and when you have a case where
8 hundreds, thousands, or millions of creditors are affected
9 by an order, and a very small subset of the universe of
10 people who were affected by the order want that order blown
11 away or ignored.

12 Mr. Weisfelner, you said in your brief that due
13 process involves the right to be heard, not the right to
14 win. And because you were denied the right to be heard, it
15 seems to me that you're saying you (indiscernible) the right
16 to win. Let's go with that for a minute.

17 If you (indiscernible) the right to be heard,
18 wouldn't the appropriate remedy be a do-over, to give you a
19 chance to make the arguments that you didn't get to make the
20 first time, and then to look at the matter ab initio to see
21 whether the result should be the same or should be
22 different? Because it seems to me that what you're asking
23 for, assuming that you're (indiscernible) due process and
24 you've heard my questions that suggest that -- and I have
25 concerns as to whether you guys were denied due process --

1 you're asking to simply win.

2 Is it speculation or is it totally obvious for me
3 to say now that I wouldn't have denied permission for GM to
4 survive and to conduct its 363 sale so that one group of
5 litigants could get a leg up over another group of
6 litigants? Or I guess I should say one group of creditors
7 should -- could get a leg up on other creditors.

8 And why in the world would I decide the
9 successive liability issue differently today than I did
10 after talking about it for five or 10 or 15 pages in my
11 first opinion, when I considered the arguments made by
12 people like Mr. Jack (indiscernible), who argued the exact
13 same things that you're arguing now after they had
14 (indiscernible) given the appropriate notice?

15 So, what I need you to do, Mr. Weisfelner, is tell
16 me that, if you had been given notice and an opportunity to
17 be heard back in 2009, how would things be different? Are
18 you arguing to me that I would have denied permission for
19 the sale, or that I would have granted a free-and-clear
20 order generally but I would have denied it for your favored
21 group?

22 Or do I properly read from your brief that you
23 would have wanted me to give the sale some kind of
24 conditional approval for your benefit, saying I'd approve it
25 if, but only if, New GM were required to assume your claims?

1 And then, if that's your position, would you please tell me
2 whether there would be some reason for me to grant that
3 protection for people who were claiming that their cars were
4 worthless or that they were inconvenienced, when I denied
5 that relief for people who were injured or killed in actual
6 wrecks?

7 Also, Mr. Weisfelner, let's talk about the exact
8 context of 363 sales, and recognize, as I think we need to,
9 that 363 sales are an extraordinarily important part of the
10 bankruptcy (indiscernible), not just in this case but
11 winning in the other 11s, and that whatever I do, for better
12 or worse, is likely to have precedential effect.

13 How can a judge force a buyer of assets in a 363
14 sale to assume liabilities that it doesn't want to assume?
15 Isn't the only real remedy to deny authority for the sale
16 totally, or to say, were I the judge back in 2009, that,
17 "Yeah, the sale can take place, but I, the judge, won't
18 grant a free-and-clear order at all"?

19 And, if that is the choice that's provided to the
20 judge, how helpful is that to the remainder of the creditor
21 community, the thousands of people that Ms. Rubin
22 represents? And do we want to impose a principle of law
23 that requires judges to frag everyone else with the same
24 grenade?

25 Mr. Steinberg, despite the reservations that I

1 just had expressed, I have some in your direction as well.
2 Before I read the briefs and the underlying cases, I'd
3 started with (indiscernible) stint in bankruptcy, orders and
4 agreements rise and fall as a whole, and that you can't
5 enforce them in part and disregard them in part, or cherry-
6 pick the parts that you like and those that you don't, or,
7 as here, say they're enforceable against most of the world
8 but not against this or that favored class.

9 But your opponents have cited five cases that seem
10 to do exactly that. Three, while they come out of lower
11 courts, one Bankruptcy, two District, involve 363 sales.
12 The other two don't involve 363 sales, but they come from
13 the Second Circuit. And, while one of the Second Circuit
14 cases is only a summary order, which therefore isn't a
15 binding precedent, it's still a Circuit -- Second Circuit
16 opinion. And, frankly, I don't like to disregard anything
17 that comes out of the Second Circuit, that the Second
18 Circuit tells me.

19 So, Mr. Steinberg, I need you to talk about
20 Metzger, the 2006 decision by Arthur Weissbrodt, a
21 bankruptcy judge in San Jose; (indiscernible), the 2007
22 decision by District Judge Mary Cooper in Trenton; and
23 (indiscernible), the 2009 decision by Senior District Judge
24 John Grady in Chicago.

25 And I need you to talk about the Circuit's 2010

1 decision in Johns Manville, Travelers v. Chubb, which I
2 think is sometimes referred to -- I believe this is Manville
3 4; and its 2014 decision in Koepp, K-O-E-P-P, the summary
4 order from a panel that included Judge -- Chief Judge
5 Katzmann and Judges Livingston and Hall.

6 Finally, while it may be trumped by the holdings
7 of those five cases that I talked about, I still need some
8 help on whether I should be looking at this in
9 (indiscernible) of 9024 and 60(b) terms, or whether I should
10 just bypass what those rules say and get to the "You're
11 excused from the order or not" kind of (indiscernible) those
12 other decisions did.

13 But I still want both sides to address whether a
14 judge has to look at it in traditional 60(b) terms and
15 either knock it out or live with it, or the third option,
16 which may or may not be permissible under 60(b) doctrine, of
17 living with it in part and validating it in part.

18 Mr. Weisfelner, you can help me by confirming, if
19 it's true, that you're saying I shouldn't be thinking about
20 invalidating the (indiscernible) or validating the rule but
21 simply refusing to enforce it. But, if that is in fact your
22 position, then help me understand how I can be deciding this
23 without regard to a (indiscernible) bankruptcy procedure in
24 lieu of federal civil procedure. And that would at least
25 seemingly be telling me how I'm supposed to do my job.

1 Finally, folks, in many ways this is the most
2 important of all the things that I want you to talk about,
3 because I think it's the closest question, in an environment
4 where there are already a bunch of close questions. If we
5 had a do-over, and it's my instinct that, when somebody is
6 denied due process, he or she is entitled to a do-over, the
7 result of part of what you guys are arguing would be pretty
8 clear. But part would be highly debatable. And, in each of
9 those two sides, or prongs, one side would have the stronger
10 side and one would have the weaker.

11 If we had a do-over, I think it's quite clear that
12 I'd still grant a free-and-clear order, especially since I
13 heard the same arguments before and I rejected them. And I
14 gave them a lot of thought before I did. But if we had a
15 do-over, I'd likely have to consider whether a free-and-
16 clear order in the form that I just issued it was over-
17 broad. And, in this respect, the economic loss plaintiffs,
18 though not Mr. Weintraub's guys, would have the upper hand.

19 This order, as I read it, not only blocks
20 successor liability, but also blocks claims based on wholly
21 post-sale events that involved Old GM or Old GM parts. This
22 is one of the issues, if not the issue, that bothers me the
23 most. And the issue is whether what I should have done, or
24 would have done if the argument had been made to me then,
25 was to add a new order that was narrower and said that

1 people couldn't sue based on anything Old GM had done, but
2 they could sue if it was based on what New GM had done, so
3 long as Old -- as New GM wasn't blamed for Old GM's acts.

4 And if, as I'm inclined to rule, I find that, if
5 there was a due process violation, the economic loss
6 plaintiffs would be entitled to a do-over, and if I also
7 concluded, as I'm inclined to do, that, if they got a do-
8 over on successor liability, the result would be the same,
9 the issue or the conclusion I'd reach would have been
10 different, given New GM protection for events that it did
11 that were not premised on anything old GM had done. And I
12 need both sides to address that scenario.

13 I have only one real question in (indiscernible),
14 so, even though we may not get to it this afternoon, I'm
15 going to get it out anyway. Mr. Weisfelner, is there a
16 reason that you didn't ask me to stay further distributions
17 to Ms. Rubin's guys, the Old GM creditors, until the issues
18 before me now were sorted out? Am I right in assuming,
19 since you're a pretty competent lawyer, that you didn't
20 overlook that possibility?

21 And can I properly assume that you did it for
22 tactical reasons, because you'd rather get \$100 in a
23 recovery against New GM, as contrasted to the \$0.25 or so
24 that you'd get on the dollar if you had to go against Old GM
25 (indiscernible)?

1 Now, with all of that, let's get to work. And
2 (indiscernible) we hear first from you, Mr. Steinberg?

3 MR. STEINBERG: Yes, your Honor.

4 THE COURT: Come up to the main lectern, please.

5 MR. STEINBERG: Your Honor, good morning. I'm
6 Arthur Steinberg, for the record. I'm here with my
7 colleague, Scott Davidson, and my co-counsel from Kirkland &
8 Ellis, Richard Godfrey and Andrew Bloomer. I want to thank
9 your Honor first of all for accommodating all the lawyers
10 for the rescheduling of this conference.

11 And I'm sure, like my other counsel who will be
12 addressing you today, they're all -- they have a lot of
13 thoughts swirling in their mind as they try to address the
14 multitude of questions that your Honor just went through.
15 But I think I will be able to do it, and I will do it in the
16 order where it was presented itself in the outline.

17 About a year ago, New GM announced a recall with
18 respect to ignition switches in Old GM vehicles. And
19 shortly thereafter, that started a wave of lawsuits that
20 were commenced against New General Motors, seeking purported
21 economic losses regarding vehicles that were subject to the
22 recall.

23 In the early complaints that were filed, which
24 sought primarily monetary compensation for the alleged
25 decrease in value of the vehicles based on the ignition

1 switch that was being repaired, these complaints referred to
2 Old GM and New GM interchangeably. They used the words
3 "successor liability," and they pled causes of action which,
4 under the sale agreement, were specifically identified as
5 retained liabilities.

6 And once we filed a motion to enforce, the later
7 filed complaints tried to sidestep the sale order by, among
8 other things, avoiding phrases such as "successor
9 liability." But even these more carefully crafted
10 complaints could not alter the underlying act that their
11 claims related to Old GM vehicles and parts sold and old GM
12 conduct. And their pled causes of action were the same
13 retained liabilities of Old GM.

14 And during the summer of 2014, there were other
15 recalls that New GM announced that were unrelated to the
16 ignition switch recall, and that led to additional economic
17 loss complaints being filed against New General Motors,
18 which caused New GM to file a separate motion to enforce for
19 these actions.

20 And eventually, most of these causes of actions
21 relating to economic loss, and even the accident cases, were
22 consolidated before in an MDL before Judge Furman. And lead
23 counsel was selected in the MDL, and they filed two
24 complaints, which were intended to subsume the economic loss
25 complaints that had been filed against New General Motors.

1 And the parties referred to that as the presale consolidated
2 complaint and the post-sale consolidated complaint.

3 And while these events were taking place, certain
4 presale accident plaintiffs also brought lawsuits against
5 New GM. And New GM retained Ken Feinberg to develop a
6 program to compensate, on a voluntary basis, both the
7 presale and the post-sale action and plaintiffs who had the
8 recalled ignition switch in their vehicle and had met the
9 eligibility criteria of the Feinberg program.

10 And, for those who could not or chose not to
11 participate in the Feinberg program, New GM believed that
12 the actions violated the sale order, since claims based on
13 presale accidents were retained liabilities under Section
14 2.3(b)9 of the sale agreement. So, a separate motion to
15 enforce was brought to bar those claims as well.

16 And, in response to these motions to enforce, your
17 Honor held periodic status conferences where the plaintiffs
18 raised, among other thing, the Rule 60 due -- 60(b) due
19 process issues relating to the notice of the sale motion.

20 Then, in an effort to efficiently try to resolve
21 these issues, the parties, at the Court's urgings, agreed to
22 factual stipulations. And then they identified certain
23 threshold issues that the Court might summarily decide. And
24 substantially all of the plaintiffs entered into stay
25 stipulations so that your Honor could decide those threshold

1 issues.

2 And so, in the first phase of the oral argument,
3 I'll deal with the three threshold issues that we've
4 identified, which are the due process issues, the remedies
5 issue, and the Old GM claim threshold issue. And then the
6 other threshold issue that had been identified, the
7 equitable mootness issue, will be discussed at a later point
8 this afternoon.

9 Now, the central event that underlies all of these
10 motions to enforce is the 2009 purchase by New General
11 Motors of substantially all the assets of Old General Motors
12 in a bankruptcy-approved 363 sale. And the sale was
13 structured so that New GM, at the time a U.S. government-
14 sponsored entity, would not be liable for most of Old GM's
15 liabilities, except for specifically defined assumed
16 liabilities.

17 Importantly, the liabilities that are the subject
18 of the motions to enforce are not assumed liabilities.
19 They're all retained liabilities of Old General Motors. The
20 three -- and the assumed liabilities are the glove box
21 warranty, the lemon law claim, and the post-sale accident
22 (indiscernible) claims.

23 THE COURT: Pause, please, Mr. Steinberg, because
24 I'll let you talk about that if you want. But maybe I
25 should have said this more explicitly: I'm quite

1 comfortable with the fact that all or substantially all of
2 the claims that had been brought against New GM were not
3 assumed liabilities and are blocked or proscribed by the
4 sale order.

5 But it seems to me that your opponent's position
6 is more like what we called in Freshman Civil Procedure
7 "confession and avoidance." They say, "Yeah, we know that
8 they're blocked by the sale order. But you should be
9 ignoring the sale order."

10 So, if you want to -- I also think this is largely
11 relevant to the third of the threshold issues, because I
12 think -- I'll hear from Mr. Weisfelner if he feels
13 differently -- they've conceded that they're covered by the
14 civil letter, but they say I shouldn't be enforcing it. So,
15 if you want to keep talking about what the sale order and
16 the underlying sale agreements say, go ahead and do that.
17 But I think we're probably beyond that at this point.

18 MR. STEINBERG: Appreciate that, your Honor. And
19 I agree that we are beyond it. I just wanted to make the
20 general point that we are now talking about what is defined
21 as the assumed liabilities under the sale agreement. I
22 recognize that they have an issue with what we call the used
23 car purchases, which are in their post-sale consolidated
24 complaint. And I'll talk about that when I talk about the
25 Old GM claim threshold issue.

1 And, as your Honor had said, and obviously that
2 you know, the 363 sale was approved after extensive notice
3 was given, pursuant to the Court-approved procedures. A
4 multitude of objections were filed based on the sale notice
5 given and the widespread media coverage that related to the
6 sale. And then your Honor conducted a three-day trial. And
7 the Court then rendered a very extensive sale decision and a
8 lengthy and fully-vetted sale order.

9 Now, your -- as one of your questions that your
10 Honor answered, which was, "How do you sort of calculate the
11 direct mail notice given? Where is the thing in the record
12 that says that?" the Garden City Company filed a fee
13 application -- a retention application. The retention
14 application actually described what it would cost for each
15 mail notice that it would send out, the cost of the
16 assembling of the package and the cost of the postage.

17 So, when we extrapolated as to what the cost was
18 for sending out four million notices by direct mail, which
19 we said was \$3 million, we then extrapolated, using the same
20 formula in the Garden City Company application, and said
21 that, if you had to send out direct mail notice for 70
22 million people, it would cost \$43 million. So, that's the
23 point in the record that talks about that.

24 In the sale order, among other things, New GM was
25 --

1 THE COURT: Pause, please. Is that 43 million
2 bucks for all GM car owners? Or is that for the lower --
3 somewhat lower number subject to the ignition switches, the
4 27 million or thereabouts?

5 MR. STEINBERG: The \$43 million number is
6 predicated off of 70 million domestic cars in the United
7 States.

8 In the sale order, your Honor found that New GM
9 was a good-faith purchaser for value, and it would not have
10 any successor liability for Old GM's debt. And,
11 importantly, the no-successor-liability finding that your
12 Honor gave reserved condition for the sale going forward,
13 that New General Motors would not have gone forward without
14 the successor liability finding. And that's in, I think,
15 paragraph DD of the -- of sale order.

16 The primary purpose of the 363 sale hearing -- and
17 I think a lot of your Honor's questions were directed at
18 this -- it was not to quantify the amount of the retained
19 liabilities. It was to determine what was the highest and
20 best bid for the assets.

21 That issue, the allocation of the sale proceeds
22 and the quantification of the liabilities, were for later
23 phases of the bankruptcy case: the filing of the schedules,
24 the setting of the bar date, the filing of a disclosure
25 statement, the filing of a plan. All of those actions were

1 post-sale. They were done by Old General Motors. And they
2 had nothing to do with New General Motors and they had
3 nothing to do with the Section 363 sale.

4 The -- and I think that that's significant because
5 so much of the briefing that was done in this case by my
6 opponents is directed on the fact -- and the cases that they
7 rely on are bar date cases, where you have the
8 extinguishment of a claim if you don't timely file it. And
9 therefore, a lot of the cases there talk about sort of the
10 "all or nothing" proposition.

11 Also, the person who is giving the bar date notice
12 is the person suffering the consequences if they didn't give
13 the notice properly, so that, if the Old GM estate should
14 have given a broader notice than they did, then someone who
15 comes in and says, "I should have gotten broader notice, and
16 therefore I should be able to participate in the estate,"
17 well, the person who created the problem by not giving the
18 proper notice is the person who has to incur the remedy.
19 That's a totally different situation than a Section 363
20 transaction, especially because you're dealing with the
21 third party here, the third party being the good faith
22 purchaser for value.

23 And, in the Edwards case, which we cite in our
24 papers, it is --

25 THE COURT: That's the Posner opinion, then, of

1 the Second Circuit?

2 MR. STEINBERG: That's correct. The -- and I know
3 it engendered some criticism on certain facts from my
4 opponents as they try to distinguish it. But the central
5 issue there that I think is critical for your Honor to
6 consider, and underlies some of your questions that you
7 asked, was that they said that due process issues need to
8 dovetail with the concepts of a bona fide purchaser for
9 value, that there are times when there could have been a due
10 process issue that was involved. But when you're dealing
11 with a bona fide purchaser for value, the question is
12 whether that remedy should be asserted against that party.

13 And the same issue is involved when Courts look at
14 Rule 60(b) and upsetting a sale order by virtue of the fact
15 that there wasn't due process given. The test that they
16 offer is a three-prong test: exceptional circumstances that
17 the party has to show; timeliness, timeliness of the
18 application; and undue prejudice to -- whether there was
19 undue prejudice to the -- any party. If there was an undue
20 prejudice to a party, then you would not be able to get Rule
21 60(b) relief. That is an essential element to be able to
22 try to get it in order to establish a basis to vacate an
23 order on due process.

24 And when you're dealing with a sale agreement, and
25 the party -- one of the parties is a bona fide purchaser for

1 value who would not have closed the transaction without a
2 finding that there was no successor liability, you can't
3 vacate that order. You can't partially revoke the order;
4 you can't ignore the order without ignore -- without
5 finding, at the same time, that there was an undue prejudice
6 to the party, an undue prejudice to be exposed to
7 potentially what they've asserted to be billions of dollars
8 of claims.

9 So, all of that ties in together as to why a 363
10 order is much different than a bar date circumstance. And
11 I'll get to dealing with the cases that your Honor asked for
12 me to comment about relating to sale agreements, because
13 there the situation was that the sale agreement itself was
14 either overly broad because the debtor could not have sold
15 the asset or didn't provide for selling of the asset, and
16 that's why the Court was carving out the sale remedy. It
17 wasn't because of a due process concern where they're trying
18 to allow one person to avoid what was a foundational element
19 of the sale order itself.

20 So, when your Honor had your finding and dealt
21 with the sale order issues, you were looking at things that
22 related to whether this was -- whether the assets should
23 have been sold and whether this was the best price under the
24 circumstances.

25 And your Honor's questions were exactly correct

1 about the differences between a sale agreement and a claims
2 bar order position, in that, when you're moving for a 363
3 sale, many times you're dealing with a melting ice cube
4 situation. You're dealing with a circumstance where the
5 assets are eroding. Delays are potentially destroying
6 value. And, in this particular case, your Honor had to deal
7 with deadlines that had been set by the purchaser, New
8 General Motors, as to when the sale order had to be issued.
9 And, if the sale order wasn't issued --

10 THE COURT: But back at that time, were we really
11 talking about the order to enforce?

12 MR. STEINBERG: That was correct, your Honor.

13 THE COURT: And Auto Task Force, at some point
14 before the closing, caused New GM to be formed, if I'm not
15 mistaken.

16 MR. STEINBERG: That's correct, your Honor.

17 THE COURT: Yeah.

18 MR. STEINBERG: This is the -- when we talk about
19 New General Motors at the time you're dealing with the sale,
20 we're dealing with the -- essentially the Auto Task Force,
21 the people from the U.S. Treasury. Those were the people
22 making those type of decisions. Those were the people who
23 testified before your Honor at the sale hearing.

24 Those were the people who said, when asked at the
25 sale hearing, "Why don't you just do assume the presale

1 accident claims; they're not that much; it won't destroy the
2 enterprise if you do that," and they drew their line in the
3 sand. They said, "I'm only going to take what's
4 commercially necessary. I'm not taking this." And that was
5 it. That was it. That was the choice that your Honor had
6 to make: either accept this deal based on how the purchaser
7 had formulated it, or reject the deal.

8 And your Honor recognized that in the sale
9 decision, when you said that it was for the purchaser to
10 decide which of the prepetition liabilities it was prepared
11 to assume. It was their business judgment of what they
12 wanted to do or not do. And you would either accept the
13 deal or not accept the deal. But you couldn't tell the
14 purchaser, "You have to take these liabilities in addition."

15 So, with regard to the presale accident claims,
16 they actually tried to show at the sale hearing that they
17 weren't that much. They went through Aon report to try to
18 show that, if you back out the post-sale accident claims
19 that are part of the reserves, then it may be not that much.

20 And I think Mr. Miller, on behalf of Old GM, when
21 he was the proponent, started to say, "A little here, a
22 little here, a little here, a little here, and all of a
23 sudden you have a purchaser saddled with the same type of
24 issues that Old GM had and that the government wasn't
25 prepared to, in effect, start an enterprise with those --

1 that kind of burden."

2 So, you have a situation when you have a bar date
3 where you have a melting ice cube. You clearly have more
4 time to deal with the claim issue. And you have the
5 additional circumstances that, if the person who is moving
6 for the bar date blew it, then that's the party who should
7 suffer the consequences. It's different than when you have
8 a 363 sale.

9 And I will talk shortly about why that I don't
10 think there was a due process violation at all --

11 THE COURT: Pause, please. That's the second time
12 you can say that. But can you understand, from a judge's
13 point of view, that he or she, if somebody blew it, as you
14 put it, cares more about that which is necessary to fix the
15 problem than who was responsible for the problem in the
16 first place?

17 MR. STEINBERG: I understand that, your Honor.
18 But if I was to -- if you had taken my comments to say that
19 I thought that they blew it, I don't think that they did
20 blow it. I think that the publication notice was
21 appropriate.

22 THE COURT: Of the bar date as well?

23 MR. STEINBERG: Yes, your Honor. But that's not
24 my fight. That's someone else's fight. I do think that
25 that was the situation. And I think that's consistent with

1 the case law. And I'll talk about that.

2 But I do think that the issue of who is impacted
3 on the remedy is relevant if there's a due process
4 violation. And your Honor has the Edwards situation that
5 they talked about, which is that -- assume for the moment
6 that you had two innocents here, you had the person who
7 should have gotten notice who didn't get notice, and you
8 have the bona fide purchaser for value who actually closed
9 the transaction predicated on the facts that your Honor
10 approved.

11 In the battle between a bona fide purchaser and
12 that person who claims not to have had -- gotten proper
13 notice, the Edwards case said that you side on behalf of the
14 bona fide purchaser. That is the person who wins. And then
15 you're circumscribed as to what the remedy might be, but the
16 remedy will be based on that circumstance, because of the
17 bankruptcy policy objectives of a 363 sale of achieving
18 finality, of achieving certainty, and achieving the best
19 price for the estate. And those items don't override due
20 process, but they help shape due process.

21 And those objectives, those things that you're
22 talking about now, about those bankruptcy policy objectives,
23 they're actually the elements of Rule 60(b) test, and
24 they're actually the elements of the 363(m) test. In a
25 Section 363(m) test, they say that, if you're dealing with a

1 good faith purchaser for value, and there's no stay of the
2 sale order, then the purchaser takes free of that
3 circumstance. And you --

4 THE COURT: Pause, please, here, Mr. Steinberg,
5 because, on this one, I wonder whether you're on weaker
6 ground. Mr. Weisfelner, in his brief -- maybe other people
7 said it too -- said 363(m) applies to appeals. We live in
8 an environment where the Supreme Court believes sometimes,
9 or in the view of some, even to an extreme -- you know, we
10 live in a world of plain meaning and textual analysis. Do I
11 have the right to apply 363(m) to a situation other than an
12 appeal?

13 MR. STEINBERG: No. No, but I don't think you --
14 I think the point that I was trying to make is that the
15 policy objectives of Section 363(m), what they're trying to
16 accomplish, the policy objectives of the Rule 60(b) test,
17 about an undue prejudice to a third party, they're all
18 relevant of those policy objectives as to how your Honor
19 should approach the problem.

20 All I was trying to do was saying that the
21 rationale for 363(m) is consistent with what I'm saying
22 before, not that you should be applying a 363(m) test. The
23 rationale of 363(m) is the bona fide purchaser concept,
24 which I that, if you close the transaction and you were a
25 good faith purchaser, and you were not otherwise stayed,

1 then you take, free and clear, whatever comes up after that.
2 You're protected.

3 Rule 60(b), on the -- vacating a Rule 60(b) order
4 on due process grounds has the same thing. It's done not in
5 the language of 363(m). It's done in the context of that
6 third prong, undue prejudice to a third party. When you
7 have an undue prejudice to a third party, by taking away the
8 asset after you've just paid for the asset, or undermining
9 the fundamental aspect of the deal, the Court is saying you
10 can't do that. You should be able to address due process
11 grounds, but there are constraints of what you should be
12 able to do and not be able to do.

13 And that takes me back to the Edwards case, which
14 is where Judge Posner was actually saying the same thing
15 again in different words, which is that, when dealing with a
16 sale and dealing with the fact that you have someone raising
17 issues, when you have a bona fide purchaser, the bona fide
18 purchasers are, in effect -- are the thing that you need to
19 focus on. And they actually win in a battle of that type of
20 dispute because of those bankruptcy policy objectives.

21 The Court -- all of these issues are sort of tied
22 together on the same concept, which is that a 363 sale has
23 certain fundamental objectives, and that, once a sale closes
24 to a good faith purchaser, then we're going to protect the
25 purchaser. And whether you do it under 363(m), whether

1 you're doing it under 60(b), whether you're doing it just as
2 straight as Judge Posner had done it in the Edwards case,
3 it's the same concept.

4 And I think that affects the remedies issue and it
5 actually affects whether there was a due process violation.
6 And I do want to talk a little about why I believe that
7 there was no due process violation, not because of the
8 notice circumstance, but because I don't think that there
9 was a property right that was extinguished by the sale. And
10 there's five reasons why that's the case.

11 The first one is endemic to a 363 sale. 363 sales
12 do not, in most cases, extinguish rights. They say, "I'm
13 selling, free and clear, liens, encumbrances, and interest,"
14 which the case law includes claims, and say that it attaches
15 to the proceeds of sale. So, there's no extinguishment of a
16 claim.

17 Now, there are cases where there actually is an
18 extinguished, where, if I'm selling it free and clear of a
19 covenant that runs with the land, then there's not a great
20 remedy that you can have by saying you should attach to the
21 proceeds of sale. And that's some of the cases that the
22 designated counsel cites in their papers.

23 But when the lawsuit is monetary damages, which is
24 what their lawsuits are, then, whatever their claims are, it
25 attaches to the proceeds of sale. There is no

1 extinguishment. It's another fundamental reason why this is
2 different than the bar date, because of that.

3 So, the first thing you have is that there's no
4 extinguishment in a 363 sale, whatever rights they have,
5 whatever they think they had, that attach to the proceeds of
6 sale. And they had the right, right after the sale, to
7 assert whatever claim they had in the case. The bar date
8 hadn't been set; the schedules hadn't been set. Whatever it
9 was, they had the ability to do that.

10 And the Macarthur v. Manville case, which we cite
11 in our paper, says that the underlying principle of
12 preserving a debtor's estate for the creditors and funneling
13 claims into one proceeding in the Bankruptcy Court is a
14 fundamental part of the bankruptcy law.

15 They actually have the same concept in the
16 adequate protection sections of the Bankruptcy Code, which
17 is you're selling free and clear of someone's property
18 interest, but you're giving them replacement collateral;
19 you're giving them the proceeds of the collateral; you're
20 not destroying a property interest. You're shifting it.
21 And that's fundamentally what happens in a 363(f) sale.

22 And this point was made at the sale hearing. It
23 was made by Old GM's counsel at the closing argument. It
24 was actually made by Wilmington Trust counsel as well, at
25 the closing argument, as well, too. And your Honor actually

1 had echoed this theme in your decision, when you said, "The
2 sale agreement does not dictate the terms of a plan of
3 reorganization, and it does not attempt to dictate or
4 restructure the rights of the creditors of the estate. It
5 merely brings in value. Creditors will thereafter share in
6 that value pursuant to a Chapter 11 plan of reorganization."

7 And that same point was made by Judge Gonzalez in
8 the Wolff case. I think it was Judge Gonzalez. And we cite
9 that in our papers as well, too, the Wolff opinion, which is
10 a contested matter that came up after the Chrysler decision
11 and sale order was entered. And there, Judge said, "The
12 purpose of the sale was not to effect a plan of
13 reorganization and set distributions to classes of
14 claimants, but to maximize the value of the estate and
15 support the best possible recoveries under a separately
16 confirmed plan."

17 So, the first fundamental point is that there was
18 no property right that was extinguished. It's not like a
19 bar date case where, if you don't file your claim timely.
20 It's not like a plan case where you have a discharge. In a
21 sale, the claim shifts to the proceeds of sale.

22 Second point is to why there was no property right
23 that was extinguished as part of it. And this really
24 relates to the Third Circuit decision in Emoral. And --

25 THE COURT: Which Third Circuit decision?

1 MR. STEINBERG: The Third Circuit decision in
2 Emoral, E-M-O-R-A-L. There, the Bankruptcy Court said that,
3 in the context of the successor liability claim -- and here
4 we are talking about they claimed that the sale was free and
5 clear of their successor liability rights. There's no other
6 property right that they were asserting, other than the
7 right that they think they have under successor liability.

8 Court says that, once a bankruptcy occurs, the
9 ability to assert a successful liability claim is an estate
10 cause of action under Section 544 of the Bankruptcy Code.
11 It's the same right that every creditor could have asserted,
12 and therefore the estate fiduciary is the one who could
13 bring that claim, not any individual.

14 THE COURT: I have a little problem with that, Mr.
15 Steinberg, because, when we give the estate rights that are
16 owned by creditors before the bankruptcy, we do it by
17 express statutory means such as Section 544 of the Code.
18 The ability to assert a successor liability claim, when it's
19 permissible, is to add a class of defendants that the
20 creditor can sue beyond the original assignor of the
21 property. It gives the creditor a second target, if you
22 will. Isn't that a benefit of the creditor rather than the
23 original target?

24 MR. STEINBERG: I don't think so, your Honor, for
25 the following reasons. One is that the creditors didn't

1 have a successor liability claim until the sale actually
2 consummated. There was no claim they had against New
3 General Motors. They had no claim if the 363 sale didn't go
4 through. As of the time of the bankruptcy case, they had no
5 successor liability claim against anybody. They had no
6 property right as against anybody.

7 I mean, successor liability is not the same thing
8 as a property right. It's a claim that someone acquires as
9 a sort of an equitable remedy because there's nobody that
10 you -- because either of the structure of the transaction or
11 because there's nobody else that you could sue. Neither of
12 those circumstances apply in these circumstances. The --

13 THE COURT: Stick with me for a second, because
14 there is something related to what I just said but that's
15 slightly different as well. Creditor wants to assert a
16 successor liability claim. It wants to go after an entity
17 with the potential to go after 100-cent dollars instead of
18 baby bankruptcy dollars.

19 That has the effect, for that subclass of the
20 creditor community who can sue for 100-cent dollars, of
21 giving that creditor group a leg up over the poor suckers in
22 the creditor community who can only get baby bankruptcy
23 dollars. Once again, that seems to me a benefit for a
24 favored creditor rather than a right of the estate.

25 MR. STEINBERG: Yes, but I think, your Honor --

1 and I think I understand what is troubling you about that,
2 and I think I could isolate it for you. The general
3 concepts of successor liability are generally
4 (indiscernible). There's legal successor, which is a claim
5 that everybody shares. Transaction is structured
6 (indiscernible), and so that the purchaser is the new legal
7 successor of the seller.

8 De facto merger, continuation of business, or
9 fraudulent purpose in connection with doing the transaction
10 altogether: those are the four general prongs or successor
11 liability. In the product area, in certain states, there's
12 a product line exception. And I think your Honor is
13 thinking a little about the product line exception. And
14 I'll separately address the product line exception.

15 But, with respect to the four prongs, de facto
16 merger, legal successor, continuation of business, and
17 fraudulent purpose, all of those things are something that
18 every creditor has, not one creditor, every creditor. The
19 plaintiffs here are in no better position than the
20 bondholder or anybody else to have been able to assert those
21 claims.

22 And that is why Emoral, I think, was correctly
23 decided. And that is why Emoral relied on the Keene
24 Corporation case, which was 164 B.R. 844, a Bankruptcy Court
25 case in the Southern District of New York. And it basically

1 said that successor liability claims are estate causes of
2 action.

3 And that is why Judge Lifland's decision in Alper
4 Holdings, which is 386 B.R. 441, said the same thing. Those
5 type of successor liability claims, based on the structure
6 of the transaction, those are things that are estate causes
7 of action. The estate representative is the one in charge
8 to bring it. And, in the context of the 363 sale, the
9 estate representative is the one who could release it.

10 Third reason why I don't think there was a
11 property interest -- and this is actually in your Honor's
12 decision, and it doesn't say it explicitly, and I don't want
13 to put words that says that you tried to say something
14 explicitly, but you clearly had the concept in your mind.
15 In Footnote 99 of your decision, you said that, in
16 discussing successor liability, you said, "The Court notes
17 that, as a matter of federal bankruptcy law, Section 363(f)
18 of the Bankruptcy Code trumps state law and requires a
19 different result."

20 And so, it would have been nicer if you'd said
21 federal preemption. You didn't use those words, and I don't
22 mean to try to say that that's exactly what you tried to
23 say. But those are -- that is the concept, which is that,
24 when you're -- because of the bankruptcy policy objectives,
25 and the federal bankruptcy law, of trying to achieve returns

1 on assets, that that has a tendency to trump state law.

2 And, in the White Motor case, the Bankruptcy Court
3 for the Northern District of Ohio, they said that effects of
4 successor liability in the context of a corporate
5 reorganization preclude its imposition. The negative effect
6 on sales would only benefit product liability claimants,
7 thereby subverting the specific statutory priorities
8 established by the Bankruptcy Code.

9 So, there, he was more -- the judge was more
10 specific in saying that there was a federal preemption
11 concept. But even if you don't want to go that far, your
12 Honor was recognizing in your sale decision, in trying to
13 justify why you were making your ruling on successor
14 liability, that there were concepts about the Bankruptcy
15 Code, Section 363 sales, that trump state law in connection
16 with successor liability. And I think that that is true.
17 And I think that the case law recognizes that. And some
18 judges have said it more explicitly than what your Honor was
19 alluding to.

20 The fourth reason why I don't think that there was
21 a property right that was extinguished here is that your
22 Honor decided, as a matter of fact and law, that there was
23 no successor liability claim. The four-prong test, the most
24 important factor on the four-prong test -- and this is
25 undisputed -- is that there was no continuity of ownership

1 between the purchaser and the seller. New General Motors
2 was going to be owned primarily by the government. The
3 shareholders of the seller were going to be wiped out.
4 There's no continuity of ownership.

5 If you don't have continuity of ownership, you
6 don't have de facto merger as a matter of law, you don't
7 have legal successor. Your Honor found, as a matter of law,
8 that this sale was not of a fraudulent purpose. That wipes
9 out the other element.

10 And, on the continuity of the business section, in
11 the Second Circuit decision of Douglas v. Stamco, which is a
12 2010 Second Circuit opinion, they actually talked about that
13 provision. And they said, if the seller survives, even in
14 the context of a liquidating trust, if it survives, then you
15 -- then the continuity of ownership factor is not
16 established. You don't have successor liability on that
17 basis.

18 And that's what happened here. I mean, Old GM
19 survived. Old GM is still -- well, we argue; GUC Trust can
20 disagree -- its successor is the GUC Trust. But certainly
21 it survived until almost -- until two years after the
22 transaction. So, there is no of those four elements, as a
23 matter of fact, that would have established successor
24 liability, which then takes me to the fifth point, which is
25 the product line exception, which is true in only certain

1 states.

2 And, if it wasn't federally preempted, and if it
3 wasn't in an estate cause of action, and if you were
4 concerned about the claim was going to be extinguished
5 because of the 363(f) concept, even though I don't think
6 that that's true, then you have to see -- do an economic
7 loss plaintiff, do they have any claim under the product
8 line exception? And the answer is no. We have not been
9 able to find a case; they have not cited a case. The
10 product line exception doesn't apply to them.

11 Whatever the state law was, whatever rights these
12 state laws are trying to protect, it's not protecting
13 economic loss plaintiffs. It's also not protecting presale
14 accident plaintiffs. The purpose of the product line
15 exception is that, after you have a sale, and you've had an
16 accident, and there's nobody to go after, the Court is
17 saying, "I'm going to make the successor potentially
18 liable," in certain states, not a lot of states, a minority
19 of states.

20 That's not what happened here. Because the post-
21 sale accident paradigm was actually assumed by New General
22 Motors, it took away the successor liability issue on the
23 product line exception.

24 And that is why, when someone asks me, "Why did
25 your Honor carve out in your decision about successor

1 liability to the extent Constitutionally permissible for the
2 asbestos plaintiffs -- why weren't you broader? Why did you
3 limit to the asbestos plaintiffs only?" and I wasn't sure
4 what the answer was. But I did know that, vis-à-vis the
5 product people, that exception didn't apply anymore. That
6 concern of future creditors didn't apply anymore, because
7 the sale agreement had that as an assumed liability of New
8 General Motors.

9 So, the threshold issue of the threshold issue of
10 due process was: was there a property right extinguished?
11 And I've told you why, your Honor, there were the five
12 separate reasons why there was no property right
13 extinguished, and therefore you don't have to get to all the
14 other issues that are embedded here.

15 The next thing I'd like to talk about is the
16 burden of proof. I think, when this case started, I kept on
17 hearing Rule 60(b). And, when you read the briefs that were
18 filed in this case in response to our brief, there's no real
19 mention of Rule 60(b) anymore. They want to make -- they
20 want to say that I'm entitled to this relief but I'm not
21 working under Rule 60(b).

22 And I think the reason why is what I articulated
23 before, which is that they don't have a case under Rule
24 60(b), because Rule 60(b) requires them to show that there
25 would not be an undue hardship on a party. And you can't do

1 that with a bona fide purchaser for value.

2 And that concept of how 363 sales, burden of
3 proof, bankruptcy policy objectives -- I think Judge Peck
4 was trying to deal with that in the Lehman case, when he
5 said that there was something about it that he thought that
6 the burden of proof, in connection with 363 sales, is even
7 higher than in other circumstances, because of that.

8 And in the Lehman case, he was looking at whether
9 the actual fundamental aspect of the sale -- whether an
10 asset had been properly disclosed to him was appropriate.
11 And even there, he said that he was not going to upset the
12 sale, even if he thought there should have been better
13 disclosure on the actual assets that were being transferred.

14 That's a much harder case than what's been
15 presented to your Honor, where there's no issue about what
16 the assets were that were being sold. The issue is whether
17 there was a proper description of retained liabilities in
18 the context of a sale which was not trying to extinguish
19 retained liabilities. A hearing where the purpose was not
20 to deal with retained liabilities; those issues were for
21 another day. And therefore, I think that's what the judge
22 was trying to deal with Lehman.

23 The issue that your Honor had raised in one of
24 your questions, which is, "Can I just carve them out of the
25 sale order, and leave the sale order in place, but just

1 carve them out?" I know your Honor has written and spoken
2 many times, and sometimes I'm on the right end of this and
3 sometimes I'm on the wrong end of this, but your Honor talks
4 about stare decisis, the ability -- the need to follow the
5 law of the circuit, and that that guides how you render
6 these decisions.

7 And I would just point out to your Honor that the
8 argument about "carve me out of the sale order" was actually
9 made on appeal of your Honor's decision. It was in the
10 Campbell case. And it was actually the presale --

11 THE COURT: That's the one before Judge Buchwald.

12 MR. STEINBERG: Yes. It was actually the presale
13 plaintiffs. They said, basically, to the judge, "I want you
14 to apply the sale order to everyone but me. And then you
15 could approve the order." And then the judge used terms
16 like "elective surgery," "knock the props out from the
17 transaction," and said, "I can't do that. And even the
18 Bankruptcy Court couldn't do that. The bankruptcy order
19 talked about this was an integrated transaction. Every term
20 is dependent on every other term. I can't blue-line the
21 order."

22 And even if there was a peripheral thing that you
23 could blue-line and ignore the provision of the order,
24 successor liability was not a small item here. That was a
25 fundamental, foundational point that you just can't ignore.

1 THE COURT: Pause, please, Mr. Steinberg. You're
2 ahead on successor liability. But your opponents' stronger
3 position is on matters that were not raised by Campbell.
4 Campbell is Mr. Jakubowski's guys, if I recall.

5 MR. STEINBERG: Right.

6 THE COURT: There were 12 litigants who were in
7 real, genuine car wrecks who wanted to sue New GM, along
8 with Old GM. Judge Buchwald, like me, didn't address the
9 more debatable aspect of the sale order, which was
10 protecting New GM from its own wrongful conduct. Now, should
11 I regard her principles as a pawn to an argument that was
12 never made before either her or to me?

13 MR. STEINBERG: No, but, your Honor, I think --
14 I'm glad that you raised that point again, because I will
15 try to now answer your question, because, fundamentally,
16 underlying your question is something that I disagree with.

17 Let me start with the proposition that I agree
18 with you. I think, if New GM had an independent duty in
19 conduct vis-à-vis anything -- and clearly it assumed
20 liabilities, right? So, it assumed the glove box warranty;
21 it assumed the lemon law; it assumed the obligation to
22 conform with federal law on the recall; it assumed the
23 obligation on the post-sale accidents. I think, if those
24 things are involved, then that's New GM's obligation.

25 And the New GM obligation actually related to Old

1 GM vehicles. Why? Old GM -- New GM assumed the glove box
2 warranty with regard to Old GM vehicles. New GM assumed the
3 lemon law responsibility as defined in the sale agreement
4 with regard to Old GM vehicles. New GM agreed to assume
5 post-sale accidents with regard to Old GM vehicles. And New
6 GM agreed that, if there was going to be a recall that was
7 necessary on an Old GM vehicle, it will do the necessary
8 repair for an Old GM vehicle. So, New GM did have
9 independent conduct that your Honor was not insulating as
10 part of a sale order relating to Old GM vehicles.

11 But that was it. If there was nothing that New GM
12 specifically assumed relating to an Old GM vehicle other
13 than those things, then everything else relating to an Old
14 GM vehicle was a retained liability. And it had no
15 independent duty for anything related to that. That was the
16 purpose of the no-successor-liability finding.

17 THE COURT: Yeah, I understand that. But if Mr.
18 Weisfelner had shown up back in 2009 and made the same
19 arguments he's making now, he would have said, in words or
20 substance, that you can't protect New GM from its own
21 wrongful conduct so long as it's independent of the Old GM
22 conduct, whether or not it involved Old GM or New GM parts
23 or cars.

24 MR. STEINBERG: If it doesn't involve an Old GM
25 vehicle, or an Old GM part sold by Old GM, or Old GM

1 conduct, he would be right.

2 THE COURT: Well, let me tell you an example.

3 Suppose I don't think New GM actually fixed its cars. And I
4 don't know whether it ships the parts to mechanics that do.
5 But suppose New GM knowingly -- and I understand this is a
6 wholly fictitious hypothetical. But suppose New GM
7 knowingly put a defective Old GM ignition switch into either
8 a New GM or Old GM vehicle.

9 If it knew that the switch was crummy, it wouldn't
10 be liable for having designed the switch wrong, but it would
11 -- arguably, I'm not going to get into stuff that's Judge
12 (indiscernible)'s issues -- but it could arguably be liable
13 for knowingly putting the crummy part into an Old GM
14 vehicle.

15 MR. STEINBERG: I agree.

16 THE COURT: Or New GM vehicle. And, as I read the
17 sale order, it gets a "get out of jail free" card in that
18 kind of conduct. The sale order and the sale agreement.

19 MR. STEINBERG: I don't think so.

20 THE COURT: Okay. Then if you're contending that
21 that wouldn't be an issue, maybe that issue would go away.
22 But that is a matter of concern to me because of the breadth
23 of the documents in which you've read so much.

24 MR. STEINBERG: No, no. But, your Honor, I think
25 that, if it relates to an Old GM vehicle, and somehow, when

1 it was sold, New GM took on a contractual obligation
2 independently, took on a contractual obligation to warranty
3 some aspect of that vehicle going forward, I think New GM
4 has that contractual obligation. I wasn't looking a-- and I
5 know it's a catchy phrase to say, "get out of jail free"; I
6 don't think that's --

7 THE COURT: I tend to get a little colloquial, but
8 you know where I'm coming from.

9 MR. STEINBERG: I do. I do, your Honor. I just
10 feel that there's probably people at the company listening
11 to what I have to say, so I wanted to at least say something
12 in response to that, because I don't think "get out of jail
13 free" is the right way of doing it.

14 But no one was looking to absolve New General
15 Motors for independent duties that it voluntarily took on
16 after the sale. But it purposefully did not take on
17 responsibilities with regard to Old GM vehicles that were
18 not assumed liabilities. And what they've articulated --
19 and this is dealing with the Old GM claim threshold issue --
20 what they've articulated is something that has nothing to do
21 with New General Motors.

22 And I'll give you an example. There was -- and I
23 think we gave a couple of these in the -- in our briefing.
24 There is a plaintiff named Rafael Lewis who brought -- who's
25 in the post-sale consolidated complaint. They recognize

1 that the presale consolidated complaint, if you're not going
2 to upset successor liability, the presale consolidated
3 complaint falls. The presale accident plaintiffs also
4 recognize the same thing, that, if you -- successor
5 liability is going to be upheld, they lose.

6 The reason why the lead counsel broke up the
7 complaints between the presale and the post-sale was they
8 were trying to isolate those issues that they think survive
9 even if your Honor upheld the successor liability. So, this
10 is in the post-sale complaint, not the pre-sale, the post-
11 sale.

12 Rafael Lewis bought a 2006 Chevrolet Cobalt after
13 the 363 sale at an auction for \$2800 with no warranty. His
14 claim is that, years after he made his \$2800 auction
15 purchase, the value of his now eight-year-old vehicle had
16 gone down, because a recall was announced that was going to
17 fix the ignition switch problem in his car that he was
18 otherwise not aware of.

19 New GM did not manufacture that car in 2006. New
20 GM did not sell him the car in -- after 2009. Yet somehow,
21 according to the economic loss plaintiffs, New GM is
22 required to protect the value of that car purchased by
23 Plaintiff Lewis with no warranties from unrelated third
24 party. You don't get there unless you have successor
25 liability. That claim is predicated on successor liability.

1 There's no independent duty that they had on a transaction
2 that they weren't involved with. And the GUC Trust jumps on
3 the misguided bandwagon and says that, and they're equally
4 wrong as well.

5 We pointed out Plaintiff Barbara Hill. She bought
6 a 2007 Chevrolet Cobalt after the 363 sale from a Nissan
7 dealer. New GM did not manufacture her car in 2007 and they
8 didn't sell her a used car after the 363 sale. Yet,
9 according to the economic loss plaintiffs, on their post-
10 sale consolidated complaint, New GM is liable for the
11 alleged loss in the value of her seven-year-old car after
12 the 363 sale by a Nissan dealer.

13 You don't get there unless you're asserting
14 successor liability. There is no independent duty. And you
15 can clearly see that by understanding what their post-sale
16 consolidated complaint tries to do.

17 It says that the people who are -- that New GM is
18 liable to is not the people who just are -- had vehicles
19 that were recalled in 2014. That's the 27 million people.
20 It's not just them. It's everybody that New GM sold a car
21 to since 2009, even if they had no subject to a recall.
22 Why? Because the magnitude of the quantum of the recalls
23 tarnished the GM brand as a whole. And, by New GM profited
24 from selling all of those vehicles. And that's why they
25 should be liable for the tarnishing of the brand.

1 Well, how does that theory make any sense at all
2 when you're dealing with a used car sale? New GM didn't
3 sell that car. New GM didn't profit from that car. New GM
4 didn't make any representations about that car. That's the
5 -- that's a critical element of their post-sale consolidated
6 complaint; it has nothing to do with an independent duty
7 that New General Motors assumed or not. That's the
8 successor liability claim, nothing more than that.

9 When the complaint deals with what is in essence
10 successor liability, that is what we say should be
11 proscribed. We're not looking to try to take an independent
12 duty. The reality is, though, they have asserted an
13 independent duty.

14 The -- Judge Bernstein had this issue in the
15 Burton case. There, they talked about the duty --

16 THE COURT: Burton being one of the Chrysler
17 cases?

18 MR. STEINBERG: Yes. There, they talked about a
19 duty to warn. And that was a case brought by economic loss
20 plaintiffs. And Judge Bernstein said, "Duty to warn deals
21 with accidents. You're not asserting an accident claim.
22 There is no duty to warn. It's not an independent duty."
23 He said, "What you're doing is nothing more than a successor
24 liability claim, and I'm going to deny your ability to
25 assert that."

1 That's the essence of what we're talking about
2 here. And you also get to the concept that these are really
3 successor liability claims when you look at the sale
4 agreement and the sale order. The sale agreement talks
5 about what are assumed liabilities and what are retained
6 liabilities. If you're not an assumed liability in the
7 carefully defined provisions of Section 2.3, then by
8 definition everything else is a retained liability.

9 Liability is defined in the sale agreement as any
10 liability that occurs or accrues even after the closing
11 date. So, people understood --

12 THE COURT: Can you -- were you quoting or
13 paraphrasing from the sale order, from the sale agreement,
14 or --

15 MR. STEINBERG: I'm quoting from the definition of
16 liability under the sale agreement.

17 THE COURT: Can you give me the cite to that,
18 please?

19 MR. STEINBERG: It's Section -- it's in the
20 definitions section.

21 THE COURT: In the definitions of the sale
22 agreement?

23 MR. STEINBERG: Right.

24 THE COURT: And that's of retained liability?

25 MR. STEINBERG: The definition --

1 THE COURT: Or assumed liability?

2 MR. STEINBERG: No, the definition of liabilities
3 is in the sale agreement, and that's what I was referring
4 to. Assumed liability versus retained liability is in
5 Section 2.3 of the agreement.

6 THE COURT: The matter being 2.4?

7 MR. STEINBERG: 2.3, I believe.

8 THE COURT: 2.3?

9 MR. STEINBERG: 2.3. The sale order provision is
10 in Paragraph 46. Paragraph 46 confirms the point, when
11 you're dealing with Old GM vehicles. It provides that,
12 except for assumed liabilities -- again, we're not talking
13 about assumed liabilities -- New GM shall not have any
14 liability for any claim that, A, relates to the production
15 of vehicles prior to the closing date, or, B, is otherwise
16 assertable against Old GM.

17 Every one of their claims, the economic loss
18 plaintiffs' claims, is a claim that's assertable against Old
19 GM as it relates to an Old GM vehicle. The sale order
20 proscribed that from being asserted against New GM.

21 And that's why we say in our brief that, if you're
22 dealing with an Old GM vehicle, there wasn't anything that
23 was left to chance. It was a binary choice. We assumed
24 certain specific things -- glove box, lemon law, accidents.
25 We didn't assume anything else. Anything else, they were on

1 their own.

2 And it's not like this argument wasn't raised at
3 the sale hearing. It was raised by the -- at the sale
4 hearing. This was raised not only by the consumer advocacy
5 groups, it was raised by the states' attorney generals and
6 they actually said things like you know, your Honor, there
7 are people here who may not even know they have a claim and
8 you're in effect eliminating their claim. And the answer is
9 yes. The answer is yes.

10 And that makes perfect sense as well too because
11 it wasn't like Old GM had stopped manufacturing cars two
12 years before the sale. They were manufacturing cars
13 throughout. There was going to be a circumstance where a car
14 that was manufactured two months before the sale or sold six
15 weeks before the sale that there may be an issue that
16 related to that car and that is going to come up post-sale.
17 And if it wasn't covered by the expressed warranty and if it
18 wasn't an accident and if it wasn't something by the Lemon
19 Law that person was not going to have a claim against new
20 General Motors unless New General motors decided to
21 voluntarily take that claim on. That was the firm cutoff.

22 But when you look at the sale, the sale order
23 specifically contemplated that these claims, claims relating
24 to latent design defects, that they could be asserted post-
25 bankruptcy and that if they do it is not going to be

1 something that switches the dichotomy between what new GM
2 agreed to and what Old GM agreed to do.

3 I'm trying to think. I still have a half hour I
4 think. Your Honor --

5 THE COURT: I know I asked a lot of questions.
6 I'll cut you a little bit of slack on my taking up so much
7 of your time and of course I'll do my --

8 MR. STEINBERG: Your Honor, I appreciate that. It
9 so happens that I'm so far off my outline about where I am
10 now I probably will need the rebuttal time to figure out how
11 to get back to where I need to be.

12 I want to talk about five cases that you raised as
13 to why they're not the situation here. The first is --

14 THE COURT: Before you're done I also want you to
15 help me with the similarities and the differences between
16 Judge Bernstein's opinions that come to opposite results,
17 Grumman Olson on the one hand and Chrysler, I think it may
18 be Burton on the other.

19 MR. STEINBERG: Well, let me take that because I
20 think Grumman Olson is actually an easy case.

21 Grumman Olson was a case where there was a post-
22 sale accident and the person who was the plaintiff here had
23 no connection, no relationship at all with Chrysler. It was
24 a person that was driving a car that had a manufactured part
25 that was defective, but wouldn't have known that at all.

1 Judge, in the Burton case, the argument was that
2 they're a future creditor and you can't cut off their right
3 because they had no connection at all with the debtor.

4 That's not in any why the situation here.

5 THE COURT: First, to what extent was either
6 related to whether a claim could be asserted notwithstanding
7 a seeming discharge on the one hand or a 363 free and clear
8 provision on the other.

9 MR. STEINBERG: I think in Burton, I'm sorry, in
10 Grumman Olson, the judge said this issue wouldn't have come
11 up in like the GM situation because that claim, the post-
12 sale accident claim, is assumed by new General Motors. So,
13 we're not going to have this due process issue. We're not
14 going to have this future creditor issue and Judge Bernstein
15 in Burton said economic loss plaintiffs are different from
16 the Grumman plaintiff. The Grumman plaintiff is at minimum a
17 future type creditor and that's not what the Burton
18 plaintiffs were. They were economic loss plaintiffs. They
19 held contingent claims. They were unknown creditors. They
20 would be bound by the sale order.

21 So, in one circumstance here you have claims that
22 are assertable against Old GM that they are economic loss
23 claims. They are at worst unknown creditors. I know your
24 Honor wants me to address unknown versus known, but they're
25 clearly not future creditors and plaintiffs don't argue that

1 they're future creditors.

2 They may like the words of Grumman, but they know
3 that they're not Grumman. They're not the Grumman
4 plaintiffs. They specifically said that they're the opposite
5 of Grumman.

6 Grumman they said there is no way you could have
7 notified us because we had no connection with the estate.
8 These plaintiffs said you should have notified us and they
9 obviously know their connection with the Old GM estate, they
10 bought a car from Old GM. So, Grumman is not in any way
11 related to the issues that your Honor has to tackle.

12 If new GM hadn't amended the sale agreement to
13 account for post-sale accidents you would have had to face
14 the Grumman issue in this case now. But that changed.

15 The Burton case is actually on point -- latent
16 defect discovered after the sale, economic loss claim. The
17 judge recognized that what they were really asserting a
18 successful liability, uses the quote, "Anybody who owns a
19 car now is not going to have a problem with the car."

20 This case is Burton. To that matter, your Honor,
21 although it doesn't come up in the same exact context, this
22 case is very similar to I think your Morgenstein decision as
23 well too. In Morgenstein the issue that was raised was by a
24 product person claiming that in effect that that there was a
25 fraud on the Court, not a due process violation. They went

1 even further. They went to the fraud on a court section and
2 they said when Old GM presented its plan, when Old GM
3 presented its bar date they didn't send us the notice that
4 they should have. They knew that there was a defect in the
5 product that we bought. There are 400,000 cars that are
6 affected. We should have had notice. We shouldn't be subject
7 to the bar date. We shouldn't be subject to the injunction
8 under the plan.

9 The remedies that they asked for were a little
10 unusual. They asked for a partial revocation of the plan
11 which there are specific sections in the Bankruptcy Code
12 which talk about revocation of the plan and your Honor did a
13 strict statutory analysis, but it is in my view similar to
14 the partial revocation remedy that the plaintiffs are trying
15 to assert here. And then your Honor said that they didn't
16 plead fraud with the particularity, Rule 9B in the
17 Morgenstein decision.

18 But fundamentally what they were arguing about was
19 I should have gotten notice, I didn't get notice and now I'm
20 barred because you knew, you Old GM, knew that there was a
21 defect in my car and you didn't tell me. And their ultimate
22 remedy was you don't have a remedy and that I think is
23 similar to the circumstance that you Honor has here.

24 The five decisions, let me see if I can get this
25 right, the Metzger decision. There was -- the county had a

1 covenant to the land development and they were a known
2 creditor. People knew that they had a covenant with the
3 land, it was a public record, and you couldn't then sell the
4 land and then try to preserve the covenant. So, the court
5 had to deal with that singular circumstance and the
6 purchaser was arguing that the covenant was wiped out by the
7 sale and that there was no way that the sale proceeds could
8 satisfy that. So there you were dealing with a circumstance
9 where there wasn't a monetary damage claim and the 363 sale
10 actually reflected an extinguishment of a known property
11 right. That's not I think what you have here.

12 THE COURT: But one of the reasons that I was
13 troubled or at least, not troubled, but was worried or of
14 the view, perhaps is the best of all the words, that those
15 five cases could be very significant here, is that I think
16 if that's -- you're talking Metzger by Arthur Weissbrodt?

17 MR. STEINBERG: Mm hmm.

18 THE COURT: He declined to blow away the free and
19 clear nature of that covenant without invoking 60(b), didn't
20 he? Was he just wrong when he did that? And I'm going to ask
21 the same question with respect to the other four. If I think
22 the bankruptcy judge or a district judge gets it wrong I'm
23 free to say that. I'm much less free to say that -- I can't
24 say that if it's a decision by the Second Circuit.

25 MR. STEINBERG: Well, your Honor, I think that

1 you've asked a very interesting broad question and I think
2 you obviously can decide it on the narrow grounds which is
3 the facts presented to you are not the Metzger type
4 circumstance and therefore however the judge approached the
5 problem in Metzger is not the same as you.

6 But if you're asking me on the most broad concept,
7 which is that are there cases where you don't need to get
8 the 60(b) in order to deal with a circumstance, there
9 probably are, but they probably have unique circumstances as
10 well that are not here. For example, Fuentes v. Shevin. It's
11 whether you could --

12 THE COURT: (indiscernible) detachment?

13 MR. STEINBERG: You can have a (indiscernible)
14 without notice to somebody. There the Supreme Court was
15 arguing about the Constitutionality of a statute and in that
16 circumstance the Court said that I'm going to invalidate the
17 statute as violating the due process clause. It's not a
18 matter of moving to Rule 60(b) because no due process was
19 given in effect of the procedural due process, it's a sort
20 of a substantive due process which was that the statute
21 itself was improper.

22 I would say there are five cases that plaintiff's
23 counsel have cited that fit within that paradigm which is
24 that what actually was being done was the Constitutionality
25 of the statute itself and a court was saying I'm not

1 enforcing the statute. The statute doesn't give people their
2 elementary due process rights, that if you have a
3 circumstance where the statute says I give publication
4 notice for the potential extinguishment of a lien when it's
5 a lien of public record, the Court is saying in those
6 circumstances you'd better give direct mail notice. It's
7 easy to give that individual lienholder credit notice and
8 there's something wrong with the statute altogether. I'm
9 invalidating the sale and I'm invalidating -- I'm saying
10 they didn't get their due process rights. And they're not
11 doing it on Rule 60(b) grounds, they're doing it based on
12 the fundamental element of the statute itself.

13 So, if you're asking me whether I think in this
14 particular case Judge Metzger got it right when he said that
15 a covenant with the land was a situation where you're
16 dealing with a known creditor and the direct mail notice was
17 not provided, I think Metzger was a situation where courts
18 have to struggle with the notion that if you're a known
19 creditor and you didn't get notice you'd better have a good
20 reason why and that if you knew -- if it's the type of
21 covenant -- if it's the type of thing that's a matter of
22 public record then there's an element that the purchaser
23 kind of knew that as well too and therefore it's not as
24 clean as a circumstance that we have here. So that's
25 Metzger.

1 Polycel, there I think there's an easy answer to
2 that question. In Polycel, I think you called it Polycal so
3 either I have a typo in my outline or I got it wrong, but I
4 think I'm talking about The 2006 WL 4452982 bankruptcy New
5 Jersey case in 2006.

6 THE COURT: It's from a district judge out of
7 Trenton if I'm not mistaken.

8 MR. STEINBERG: Yes. I don't know if it was the
9 District Court or a bankruptcy court, but I have it as a New
10 Jersey case. There the issue was can you sell molds that
11 were used by the objector to the sale and there the Court
12 said that the debtor didn't own the molds. So this was an
13 issue that as a matter of Section 363 the debtor had no
14 right to sell, that the molds were not owned by the debtor,
15 therefore a sale of a right, title and interest where the
16 debtor doesn't own anything didn't transfer anything.

17 Important to know that also in Polycel that the
18 purchaser agreed to take the assets subject to whatever the
19 debtor's interest was. So they took a quit claim on the
20 molds. So when the Court carved out the situation, they
21 weren't carving it out on due process grounds, they were
22 simply saying that the objector is entitled to its property
23 interest because the debtor had no right to sell it and the
24 debtor didn't actually sell it.

25 That's -- then court said you couldn't say take

1 the sale proceeds to compensate you for the loss of your
2 molds because the guy needed the molds for his business.
3 They were essential to the integration of his business, that
4 it was an irreplaceable items. That's how Polycel is a
5 different circumstance from your Honor.

6 Compak. Compak was a case where a creditor did not
7 receive the notice and he held a license to a patent owned
8 by the debtor and the argument was that the sale order
9 extinguished the license itself and the Court said the
10 creditor had no remedy because of the loss of its license.
11 It was critical for its business and that the Bankruptcy
12 Code had special protections for patent licensees and
13 therefore the Court wasn't going to enforce that order vis-
14 à-vis the licensee.

15 And the Court also said, I think it was this case,
16 that license didn't seem to be so critical for the --

17 THE COURT: I beg your pardon?

18 MR. STEINBERG: The license didn't seem to be so
19 critical to the purchaser, but there was a specific property
20 right and that the debtor had no right to sell it free and
21 clear and was a known contractual right and therefore they
22 were a known creditor.

23 We think first it starts off that they were
24 unknown creditors and therefore the notice was proper. But
25 in the known creditor situation when dealing with a license,

1 the Court said there are special protections for licensees
2 and you can't compensate that person monetarily by saying
3 your lien attaches to the proceeds of sale, how to deal with
4 it in different circumstance.

5 So, I keep on going back to the same point, when
6 someone sues for monetary damages then not a license, not
7 molds used for their business, the remedy that you can
8 afford to use is something other than -- attaching to the
9 sales proceeds doesn't protect the objector who was deprived
10 of due process.

11 Different circumstance here. When you're suing for
12 monetary damages clearly sale proceeds can accomplish that
13 goal.

14 Koepp, that's not a Bankruptcy Code case. That's a
15 railroad reorganization case under Section 77 of the
16 Bankruptcy Act. The creditor held an easement of the record,
17 but got no notice of a plan which attempted to extinguish
18 the easement.

19 In that railroad reorganization case they entered
20 something called the consummation order. Under the
21 consummation order it said you could not extinguish this
22 encumbrance because it runs with the land and it was only
23 going to extinguish rights if you were a claimant or a
24 stockholder and the consummation would only apply to those
25 people and the person who held the easement was neither a

1 creditor nor a stockholder.

2 So the Court said that the consummation order
3 didn't govern what -- it didn't cut off this person's rights
4 anyway because you're an easement holder, you weren't the
5 creditor or stockholder and the only thing I was covering in
6 my consummation order were the rights of the creditors and
7 the stockholders.

8 So again, it was interpreting its order to say it
9 didn't apply, not that they were carving out something that
10 clearly applied for due process reasons.

11 THE COURT: Didn't the circuit in that case say
12 that they found a violation of due process and didn't they
13 blow away the extinguishment of the complaining creditor's
14 interest without every talking about 60(b)?

15 Now summary opinions are called summary for a
16 reason because they're not drafted with the precision that
17 plenary opinions are. With that said, and I don't want to be
18 critical of the circuit, but seemingly the circuit didn't
19 think 60(b) was that important.

20 MR. STEINBERG: Well, your Honor, I think to
21 defend the circuit, if I'm presented with an order --

22 THE COURT: If the circuit didn't think 60(b) is
23 important, that tells guys like me we're not supposed to
24 think that 60(b) is that important. I'm not allowed to think
25 that the circuit was wrong.

1 MR. STEINBERG: No, no. I actually think that
2 60(b) is important, but I think Koepp is a case where the
3 Court was interpreting the order that was entered and saying
4 the order didn't apply to the objective. The order was the
5 consummation order. The consummation order only affected
6 rights of creditors and stockholders and they were saying
7 that an easement person, any person who held an easement,
8 was not a creditor nor a stockholder and therefore its
9 rights were not extinguished and therefore I didn't have to
10 deal with 60(b), I was interpreting the order and saying it
11 didn't apply to them.

12 It was the same thing as the -- I'm sorry, which
13 talked about the molds. You know, you cn only sell what you
14 own. You didn't own the molds and therefore I'm interpreting
15 the order to say that those rights in the molds weren't
16 extinguished. It doesn't involve 60(b), it involves an
17 interpretation of the actual order itself. And so I do think
18 60(b) is important except you didn't need to reach it in
19 that case because you were interpreting the order and you
20 were trying to decide whether the order covered the
21 circumstance that was being complained about.

22 And then I think the last one is Manville IV and
23 there I think Manville IV fits within the same paradigm.
24 Manville IV was a circumstance where there was an injunction
25 that was entered as part of the Manville case and the focus

1 of that injunction was that entities like Travelers would be
2 protected from lawsuits and that they would be protected
3 from lawsuits because if they didn't that would erode the
4 insurance that otherwise was being given to the Manville
5 estate.

6 So, the insurance agreement was the res that was
7 part of the bankruptcy estate. In Manville IV the litigation
8 was between Chubb and the insurance company and it didn't
9 relate to the insurance. It related to whether the insurance
10 industry had defrauded as a whole the asbestos industry and
11 that they should have been protecting the industry as a
12 whole and the claim that was being asserted was a
13 contribution claim which was a prepetition direct claim that
14 one insurance company had to another insurance company. And
15 there the Court was saying that wasn't what this injunction
16 was dealing with. That wasn't what the court had
17 jurisdiction to issue an injunction. It wasn't going to
18 prevent a direct claim against another direct claim that was
19 unrelated to the insurance res which was what the Bankruptcy
20 Court had to deal with and therefore it carved out and said
21 that this didn't apply.

22 And then in Manville V it said that there wasn't a
23 failure to meet a condition precedent because the injunction
24 didn't apply to it in the first place.

25 Now, Manville has gone through lots of litigation.

1 It has gone through up and down the circuit a number of
2 different times. That is what was involved in Manville IV.
3 The most telling distinction between Manville IV and the
4 case at bar is that Manville IV was a future creditor case
5 or not even a claim at all case. They're arguing that, the
6 Chubb is arguing it never could have been contemplated at
7 the time of the channeling injunction under the plan that
8 you would have this type of claim -- someone claiming that
9 the insurance industry as a whole was defrauding the
10 asbestos industry and therefore it wasn't contemplated, no
11 one could have expected that type of claim and therefore it
12 shouldn't be barred by any kind of channeling injunction.

13 That's not their situation, right? Their situation
14 is that they're a known creditor, that they should have
15 gotten notice as to the time of the sale and we cite in our
16 papers a case which talks about, while there are
17 similarities between a channeling injunction and a 363 sale
18 where there's an injunction to protect the purchaser, in the
19 Campbell case the court says while there are similarities
20 and there are similar rationales for the protection, it's
21 not the same and there are bankruptcy policy objectives
22 relating to a 363 sale which are independent of the
23 channeling injunction that's part of the plan.

24 So, I think, your Honor, those are the five cases
25 that you've asked me to address. I'd like to talk a little

1 about the claim-specific notice issue.

2 The 363 notice approved by the court did not
3 identify any specific liabilities retained by Old GM because
4 it wasn't the purpose of the sale hearing and it actually
5 didn't have to. The sale notice itself said it was free and
6 clear of all liabilities and it was other than assumed
7 liabilities. And when you say all, there's no need to break
8 down that further into its component parts.

9 Importantly, the creditors committee, the states'
10 attorneys generals, the consumer advocates and the vehicle
11 owner attorneys never challenged the sale procedure order
12 and the specificity of the sale notice and that was never
13 appealed at all by any of them.

14 And as noted, the sale notice told parties what
15 they needed. They told them that the sale would be free and
16 clear liens and it gave access to the sale agreement and the
17 sale agreement said that -- defined what were retained
18 liabilities and said it's going to be free of successor
19 liability claims. And this picks up on one of the questions
20 that your Honor had asked. A more detailed claim notice
21 would've been extremely costly and it would have delayed the
22 sale and the value --

23 THE COURT: They're not really attacking the
24 specificity of the sale notice to my understanding. They're
25 saying that if mailed notice of the type that was sent with

1 -- I think they said first class mail, but maybe by
2 hyperbole they said by registered mail, that by not having
3 sent out the recall notices Old GM was hiding the cards. And
4 maybe it's Mr. Weintraub's brief, maybe it's Mr.
5 Weisfelner's or both, but one of them says even if you had
6 mailed us the notice it wouldn't have been good enough
7 because the recall notices haven't gone out. Could you
8 address that contention?

9 MR. STEINBERG: I think --

10 THE COURT: Or am I imagining that they said that?

11 MR. STEINBERG: I don't think that they say it
12 like that. I think they say it slightly differently. I think
13 they say that the notice had to specifically say there was a
14 defect and that you may have rights that are extinguished if
15 you don't file a claim. So, they were putting the burden on
16 the proponent in the sale context to identify all the
17 liabilities that would be potentially extinguished by a no
18 successful liability finding and to have it said with
19 explicitness. That's what I think they said. I don't think
20 they tied at all to the recall notice.

21 And by the way, if the recall was done in 2008,
22 then what? If the recall was done six months before --

23 THE COURT: Well, if the recall had been done in
24 2008 I'm not quite of a mind to say you would win this in a
25 heartbeat, but if the recall had been sent out in 2008 I

1 think that that coupled with the publication notice would
2 put you in a very strong position.

3 MR. STEINBERG: The recall -- the element of a
4 recall, this -- to put it in context, is that there was a
5 defect of a safety nature that needed to be remedied. Old GM
6 had been sued by lots of people prior to its bankruptcy
7 based on failures to design the car properly, breaches of
8 implied warranty of merchantability, fraudulent concealment
9 in the context of selling the car. Those claims existed
10 throughout.

11 Your Honor had to deal with those circumstances in
12 Castillo. Your Honor, approved the settlement in
13 (indiscernible) and (indiscernible). All of those were in
14 effect economic loss claims. They were breach of warranty
15 actions where there had been class actions that had been
16 certified, but not approved as of the time of the
17 settlement. All of those claims are Old GM claims. All of
18 them had been paid as Old GM claims.

19 The recall of when you send out a notice or not is
20 -- I don't want to minimize it, but it is not relevant to
21 the issue that I think your Honor, has to address. The issue
22 is whether warranty claims, design defect claims will retain
23 liabilities and if they were then the issue is whether the
24 sale notice was proper.

25 And your Honor has asked the question well, what

1 is the objective, what is the test that I should look at?
2 You know, they use language like reasonably, reasonably
3 ascertainable, but that's not reasonably foreseeable. What
4 does it mean by looking at the books and records? Is it the
5 same as a financial statement?

6 THE COURT: I take it -- that's easy. You agree
7 that it's not the financial statements.

8 MR. STEINBERG: I agree it's not the financial
9 statements. And I think that the Drexel case actually
10 illustrated that because there you had a contractual
11 guarantee. Guarantees don't necessarily have to be on a
12 financial statement. It didn't mean that if you had
13 contractual guarantee you shouldn't be noticing that
14 creditor if it was in the context of a bar date situation.
15 Not a sale, but a bar date. So I agree that the financial
16 statement is not the end all be all.

17 But when we say books and records we're not
18 talking about, you know, we're not talking about the
19 financial statement. We're talking about the general ledger
20 of the enterprise, what is listed as the creditors of the
21 company on the company's books and records. We're looking at
22 what the litigation calendar is. People who had sued the
23 company. People who have made a claim against the company
24 and that's the issue that I think your Honor has to tackle
25 which is that if it's not a contractual claim, if it's not,

1 you know, the cases they cited if there's an easement, if
2 there's a mortgage you should give notice to the mortgagee.
3 If I have a contractual claim that I know about I should be
4 giving notice as if I'm trying to sell or if I'm going to
5 try to do a bar date. Those are known creditors.

6 But what is the objective test when you have an
7 unasserted tort claim where the tort claimant has never made
8 a claim for that at all? In this particular case, look at
9 the circumstance here, you have, you know, the ignition
10 switch recall went back as far as 2004-2005. So you have
11 people who drove their car for five years. One of the
12 arguments on the claim-specific notice is that they didn't
13 know they had a problem. So they drove their car for five
14 years. They didn't know they have a problem. It's only the
15 announcement that we're going to cure the problem that you
16 weren't aware of that they say creates the economic loss
17 claim.

18 But if they haven't unasserted a claim and it's a
19 stipulated fact that none of the named plaintiffs in the
20 ignition switch action actually asserted a claim against Old
21 GM as of the sale. So none of them asserted a claim and Old
22 GM didn't have it on their books and records and didn't have
23 a claim that's being asserted.

24 One of the things that I think this is clear also
25 is that you can get caught up in this due process argument,

1 and I don't mean to minimize the importance of due process,
2 but the reality was is that they generally knew that there
3 was a sale hearing anyway. They've never argued, they've
4 never put in one affidavit to your Honor that they weren't
5 aware of the sale hearing. Whether they got the direct mail
6 notice, the publication notice or they read one of the 1,250
7 newspaper articles or they watch television, you know, this
8 was what Judge Kaplan said. No sentient American was unaware
9 of the travails of Old GM.

10 And the cases that they cited which talk about Old
11 GM's awareness of the bankruptcy filing is not the same as
12 the awareness of the particular bankruptcy event. Well those
13 are cases which deal with the bar date. Every case that they
14 cite dealt with the bar date and there the courts were
15 saying I may know that there's a sale, I'm sorry, I may know
16 there's a bankruptcy, but I don't know in a Chapter 11 when
17 the bar date was set. I could have my rights extinguished if
18 the bar date is entered and I don't know about it and it's a
19 matter of who has the burden of telling somebody about the
20 setting of the bar date when it's not set in Chapter 11 by
21 statute, but it's set by court order. And there those cases
22 are saying the burden is on the proponent asking for the bar
23 date to send out the notice and merely the knowledge of the
24 bankruptcy filing will not obviate the necessity of giving
25 the notice of the bar date where their claim would otherwise

1 be extinguished. That's not the circumstance here. But the
2 reality is that they know. The named plaintiffs. The people
3 that they control. The people they could talk to on a daily
4 basis, they know if they were aware of a sale hearing or not
5 and there's not one piece of paper that they've issued that
6 says they were unaware of the sale hearing and the magnitude
7 of what happened in 2009 was that everybody was aware that
8 this was happening. This was not something that happened
9 just on June 1. The foreshadowing of the potential
10 bankruptcy of Old General Motors and the fact that the
11 government was going to be the sponsor to buy the assets of
12 the enterprise and whether that was a legitimate use of
13 government funds was widely debated, widely publicized and
14 widely known by everybody that was involved.

15 So, the issue of notice here is to some extent
16 irrelevant and your Honor, asked the issue about prejudice
17 and prejudice is also the same thing because it's not should
18 I have been able to argue my issue about proving my warranty
19 claim. That's not the issue. The real issue is would I have
20 been able to come into court and argue successor liability
21 any differently than anybody else argued successor
22 liability?

23 THE COURT: That's the easy half. The sale order
24 had been circulated in proposed form June 1st or June 2nd
25 substantially immediately the proposed sale order after the

1 363 motion was filed. But a reasonable tort litigant may
2 have said I'll never in a thousand years win on successor
3 liability, but I can argue vis-à-vis the form of the order
4 and (indiscernible).

5 Your problem is (indiscernible) enough to convince
6 me that I would have not issued a free and clear. Your
7 problem is to convince me that I would have issued a sale
8 order with the exact (indiscernible) and language that the
9 one that was entered ultimately turned out to be.

10 MR. STEINBERG: Well, your Honor, they have not
11 articulated what it is in your sale order that they would
12 have been able to argue was overbroad. I mean, that's a
13 question that you legitimately have asked.

14 THE COURT: I thought they did. I'll certainly
15 hear from Mr. Weisfelner and you'll have a chance to reply.

16 MR. STEINBERG: All right. But again, just to be
17 clear, if there was an independent duty that New GM had
18 after the sale, then I don't think your sale order protects
19 them of that independent duty that Old GM had. But vis-à-vis
20 old GM vehicles, that duty had already been parsed out and
21 that -- nothing was going to change by that and that the
22 timing of when you're raising the issue is irrelevant.

23 That issue relating to Old GM vehicles had been
24 parsed out and there were only certain things that New GM
25 was going to do and everything else it wasn't going to do.

1 The bar date toxic tort cases cited by the
2 plaintiffs are readily distinguishable for exactly the
3 reasons why I think your Honor highlighted in your questions
4 and which I tried to argue before and it relates to the
5 differences between the 363 sale and a bar date notice. The
6 timing of when something is issued and what is accomplished
7 by the extinguishment of a claim and that in a toxic tort
8 situation the person actually doesn't know that they have a
9 claim. They have to be told they have a claim. While in a
10 sale situation here the plaintiffs knew they had a car, they
11 knew their relevant with General Motors.

12 I know that I'm past my time. I just want to be
13 able to briefly say in five minutes something about the
14 prejudice point and then I'll say whatever else that your
15 Honor has for my rebuttal.

16 The no prejudice point we've articulated as saying
17 that when you're dealing with a bona fide purchaser the
18 remedy can't be asserted against that entity and we also
19 said that the sale notice attracted many objectors who
20 argued the exact same position that plaintiffs are trying to
21 argue now. They argued that the sale agreement should be
22 broader to protect warranty claims, all consumer claims.

23 Your Honor heard the argument that if the bond
24 exchange had been approved, everybody else would've written
25 through the bankruptcy case other than the bondholders. They

1 would have converted. But now we have a sale where other
2 people are more broadly affected including the car loans and
3 that's why you had a number of the agencies there. You had
4 over 40 states' attorney generals and you had the creditor's
5 committee, the fiduciary for all creditors raising the issue
6 about successor liability and whether these claimants should
7 have realized that their rights were being cut off.

8 And the answer was that the argument was raised
9 and their rights were being cut off. And the importance to
10 be heard in a bankruptcy case is true, but that doesn't mean
11 anything if you otherwise got notice of it in another way
12 and it doesn't mean anything that if you stood up in court
13 you wouldn't have anything new to say on the successor
14 liability issue at all.

15 So, your Honor, I know we have a hard deadline and
16 so I'm going to stop at this point in time and I'll address
17 whatever else I need to on my rebuttal time. Thank you.

18 THE COURT: Okay. We'll take a 10 minute recess.
19 I'll hear next from you Mr. Weisfelner. What is hard is the
20 approximately 3:15 time that I need to get out of here. The
21 rest we have some flexibility on. Refresh my recollection on
22 what was agreed on when we return Mr. Weisfelner. Can we get
23 you done before lunch?

24 MR. WEISFELNER: Your Honor, I think --

25 THE COURT: If we do lunch late enough?

1 MR. WEISFELNER: I think you can. I think between
2 the three designated counsel in the last letter submitted to
3 your Honor we had asked for an hour and 35 minutes. We're
4 going to keep to the hour and 35 minutes, although as
5 between Mr. Esserman and Mr. Weintraub I think we're going
6 to switch their order because it makes more sense in terms
7 of keeping the due process arguments in the same vein. But
8 we will keep to the same timeframe that we had originally
9 contemplated. Your Honor, we can start. You can break us for
10 lunch or keep us here before lunch. It's really up to your
11 Honor.

12 THE COURT: Well, if you can do it in an hour and
13 a half what I think I'd like to do is give you guys to do
14 your thing and break after that.

15 MR. WEISFELNER: I think that's fine.

16 THE COURT: There was a request by somebody for a
17 caucus room. I said I would approve it assuming that
18 everybody had the same ability. I mean all three of the main
19 constituencies. I think that has been done. That will be
20 clarified perhaps during the break. All right, we're in
21 recess, 10 minutes.

22 MR. WEISFELNER: Thank you, judge.

23 CLERK: All rise.

24 THE COURT: Have seats please. Okay Mr.
25 Weisfelner, whenever you're ready.

1 MR. WEISFELNER: Thank you, judge. Your Honor, by
2 my count you had asked about eight or nine questions that
3 were directed to me or other designated counsel and I intend
4 during the course of my presentation to respond to each and
5 every one of them. But I do want as a highlight and before I
6 get into my prepared outline, I basically think that your
7 questions were all of one variety or another of the same
8 theme.

9 First, was there indeed a due process violation in
10 this case? I think a subset of that question, what was the
11 nature of that due process violation because your Honor also
12 asked a number of questions that went to the question of how
13 might that due process violation have been avoided back in
14 2009. And then you also asked a number of questions about
15 what's the appropriate remedy were the Court to determine
16 ultimately that there was a due process violation.

17 And one of the things that your Honor indicated
18 that frankly troubled me and I want to address it right up
19 front, your Honor, seemed to suggest that the appropriate
20 remedy for a due process violation would be some semblance
21 of a do over. I think that was the phrase that your Honor
22 used, the do over. I must tell your Honor from the outset
23 that I am concerned about how one would effectuate a do
24 over.

25 In 2009 the ignition switch defect that we contend

1 GM knew about but failed to disclose, your Honor's phrase
2 failed to do a recall, but I think it goes deeper than that
3 and I'll get to that, was again something that had been
4 pending for seven full years. And if we're going to do a do
5 over how do we deal with the fact that in 2009 our new
6 purchaser, New GM, was going to maintain that silence, was
7 going to keep the ignition switch defect, which now we know
8 is a pervasive safety defect, was going to keep that secret
9 for another five full years? How in the context of a do over
10 do we deal with that 12-year history, seven years before the
11 sale, five years after the sale where there was a known
12 safety defect that GM failed to disclose? I don't know how
13 you'd do a do over in that context. If you did a do over,
14 would it impact your Honor's ability to give them a 363(m)
15 finding?

16 We also heard a lot about remedy and in the
17 context of remedy we heard a whole long discussion about
18 successor liability and does it apply and does it apply in
19 the general context and does it apply in the context of, and
20 this is critical, a car manufacturer. You didn't hear very
21 much about the fact that GM is a car manufacturer and how to
22 affects the law that ought to be applied in the case, but
23 I'll get to it.

24 Your Honor, if the order isn't enforceable, and
25 that's what we're here on, New GM's motion to enforce your

1 Honor's 2009 sale order, well if the order is not
2 enforceable for reasons I'll explain, then your Honor'
3 determination with regard to successor liability is likewise
4 not enforceable and it will be up to, not this court with
5 all due respect, but Judge Furman in the MDL or other courts
6 that have jurisdiction throughout the country to determine
7 what if any remedy is available to the plaintiffs if GM's
8 motion to stop them from prosecuting those complaints is
9 unsuccessful.

10 It'll be Judge Furman who decides if successor
11 liability applies. It'll be Judge Furman who decides that
12 that's between economic loss plaintiffs and people who were
13 involved in fatalities or serious in injuries there's a
14 difference qualitatively or quantitatively in terms of what
15 they're entitlements are.

16 And your Honor, I've got to start with one of the
17 last quotes that Mr. Steinberg gave you or statements that
18 he gave you here at the lectern because quite frankly I
19 found it astonishing.

20 In trying to convince your Honor that this is much
21 ado about nothing, these are economic loss plaintiffs, what
22 are we concerned about and it goes back to the whole notion
23 of a due process violation and what was known when, he said
24 that people drove for five years without filing a complaint.
25 People drove for five years without filing a complaint and

1 it brought to mind the Powledge case. I don't know if your
2 Honor remembers Powledge. That's the individual who with his
3 five children died in a car accident and GM's defense in
4 that lawsuit was the man committed murder/suicide.

5 Well that 2005 accident we now know was a
6 consequence of an ignition switch defect and a resulting
7 airbag non-deployment. Yeah, the family of the
8 murder/suicide victims didn't appreciate that they had a
9 claim against GM.

10 THE COURT: Mr. Weisfelner, this is exactly the
11 argument that I told you at the outset was inappropriate and
12 it's particularly inappropriate because this is a personal
13 injury or death case for which if it happened post-petition
14 New GM is already on the hook for it and if it happened pre-
15 petition I have said, unless you're going to tune me in
16 wrong, that the courts have allowed the claims that could
17 have been filed then to do it.

18 I want to hear arguments on the law. Forgive me, I
19 don't want to hear theatrics.

20 MR. WEISFELNER: Alright. Your Honor, let's start
21 then with the first and most important issue for due process
22 purposes and that's that GM contends throughout its papers
23 and throughout its argument that all of the plaintiffs were
24 unknown creditors.

25 Now the second point is as a consequence of being

1 an unknown creditor, the publication notice that was
2 affected in this matter was sufficient. The third point they
3 raise is even if there was a failure of a notice and
4 deprivation of the right to be heard there was no prejudice
5 hence no due process violation or no appropriate remedy.
6 Their fourth point is if the asserted liability isn't
7 assumed within the terms of the sale agreement its
8 (indiscernible) retained and therefore enjoined and finally
9 New GM argues a default and therefore the remedy lies
10 against Old GM's residual estate and not against it.

11 Your Honor, we've had 160 pages of briefing and we
12 had the oral argument and aside from conclusory denials I'd
13 ask your Honor to ask yourself the question what record
14 evidence does New GM point to to support its contention that
15 the pre-sale plaintiffs were indeed unknown? There's
16 precious little in their pleadings I think that go to the
17 record.

18 In their opening brief they say that plaintiffs
19 point to the fact that a certain number of Old GM personnel
20 were aware that there were some reported incidents prior to
21 the 363 sale where the ignition switch malfunctioned. But
22 then they go on to argue that the mere possibility of
23 purported claims based on engineering issues being
24 investigated prior to the 363 sale does not make such
25 purported claims known.

1 In their reply brief they argue that Old GM had
2 not determined that there was a pervasive ignition switch
3 safety problem and that claims would inevitably be brought
4 against it. Now again, your Honor, I'm not going to go
5 through the numbers because I don't want to incur your
6 Honor's wrath again in terms of the number of fatalities and
7 serious injuries in the presale context which are all a
8 matter of record in the Feinberg protocol and reported on
9 the victim website. But we know today as New GM has
10 acknowledged that the ignition switch defect was indeed a
11 safety defect which necessitated a massive recall and an
12 admission by the head of New GM that some 15 as yet
13 unidentified employees were being fired for misconduct
14 because they, and this is a quote, "Simply didn't do enough.
15 They didn't take responsibility. They didn't act with a
16 sense of urgency. Something went wrong with our process and
17 terrible things happened." And still GM contends that the
18 plaintiffs were unknown.

19 What again GM has studiously avoided throughout
20 the course of these proceedings is the record evidence and
21 the applicable law that mandates a much different conclusion
22 as to what Old GM knew or as a matter of law what Old GM is
23 charged with having known about the ignition switch defect
24 at the time of the 363 sale. And I want to put all this into
25 context because there's one critical point that has to be

1 made and, your Honor, it serves in our view to distinguish
2 every single case relied on by New GM on the issue of what
3 they knew for purposes of due process.

4 In trying to determine what GM knew or is charged
5 with knowing as a matter of law it's critically important to
6 remember we're talking here about a car manufacturer, not a
7 financial services firm like Drexel or the department stores
8 like Caldor or an oil company like Enron or whatever
9 business in Virodyne or Agway or New Century was in.

10 Car companies, unlike all of those other
11 businesses, are mandated under federal law and a very
12 comprehensive regulatory scheme under the Safety Act and the
13 Tread Act to maintain certain books and records regarding
14 safety or potential safety issues. And it's those federal
15 mandated records that GM was required to consult.

16 Your Honor, asked a bunch of questions of Mr.
17 Steinberg. Are we just talking about the ledger? Are we
18 talking about the balance sheet? And Mr. Steinberg wasn't
19 prepared to go beyond the ledger, the balance sheet or a
20 listing of lawsuits that were filed. Your Honor, I want to
21 paraphrase Drexel because we're talking about a car company
22 and in a car company case arguments about all I need to do
23 is look at my ledger, my balance sheet, my list of lawsuits,
24 well that's even worse than pennies on the floor not worth
25 picking up, the quote from Drexel.

1 With that distinction in mind I think it's
2 important to catalog some of the evidence that constitutes
3 the record for these proceedings and since your Honor
4 started at the outset by telling us that in effect you think
5 that there was enough to require a recall by 2009, I'm not
6 going to go through all of it, but I do want instead to turn
7 to the conclusion. Not even the conclusion, I'm sorry, the
8 introduction of the Valukas Report. And just so the record
9 is crystal clear, your Honor knows we didn't get to take any
10 discovery in this action and as the Berman affidavit that
11 was submitted as part of our papers tells you discovery in
12 front of Judge Furman on the MDL, while it's been laid out
13 in connection with bellwether trials, that discovery doesn't
14 in effect even begin until some time in the future, isn't
15 schedule to reach any kind of conclusions until I think
16 phase one discovery runs through May. Phase two discovery
17 runs through October and depositions of former and current
18 employees, including those that were terminated because of
19 misconduct and because they didn't do enough and didn't act
20 with a sense of urgency, those depositions don't even begin
21 until after the phase one discovery is over.

22 So, what record do you have? Well, as your Honor
23 indicated in your prior order, the record in this matter
24 would include such information as would otherwise be
25 available in a Rule 7056 context. You got Mr. Berman's

1 affidavit. You got my affidavit and there are only two
2 things in my affidavit I want to highlight today. One is
3 Exhibit C, which was an August 2005 email from Laura
4 Andress, a GM engineer, to James Zito, another GM engineer.
5 And again, I'll paraphrase. She was talking about one of the
6 subject cars and the design of the ignition switch and what
7 she wrote in that email is, and I'm quoting, "I think this
8 is a serious safety problem, especially if the switch is on
9 multiple programs which this switch was. I'm thinking big
10 recall. I was driving 45 miles an hour when I hit a pothole
11 and the car shut off and a car driving behind me that
12 swerved around me. I don't like to imagine the customer
13 driving with their kids in the backseat on I-75 and hitting
14 a pothole in rush hour traffic. I think you should seriously
15 consider changing this part to a switch with a stronger
16 detent."

17 Now, your Honor, I'm going to turn to Exhibit B,
18 the May 29, 2014 report of Anton Valukas and what Valukas
19 tells us is that as a car manufacturer there were several
20 processes used by GM consistent with its obligations under
21 federal law to identify safety issues including what's
22 referred to as the TREAD Database and the PRTS or Problem
23 Resolution Tracking System database. And those databases are
24 supposed to contain all sorts of different information
25 including without limitation customer service requests,

1 repair orders from dealers, internal and external surveys,
2 field reports from employees who bought to test drove GM
3 vehicles and then captured information on what's referred to
4 as the CTF or Captured Test Fleet reports, complaints from
5 their OnStar center, which by the way had 365 cases of air
6 bag non-deployment reported in the 2005-2006 timeframe, and
7 a database maintained by GM's legal department to track
8 complaints in court or out of court.

9 What does a review of those databases tell us? And
10 again, I'm not going to go through the report in detail.
11 Your Honor has it as part of the record.

12 THE COURT: Yes and apropos to that, is your point
13 that Old GM should have issued recall notices before June of
14 2009, which as you properly observed, I already agree with
15 or is it a different point?

16 MR. WEISFELNER: It's a different point. It'
17 related, but it's different and I'll get to the point and
18 then I'll move on.

19 THE COURT: Get to the point and then put the meat
20 on it so I know the relevance of this other than to again
21 show me that New GM was bad, which you're already ahead on.

22 MR. WEISFELNER: Okay. Your Honor, my point is
23 this, that as a matter of bankruptcy law and as a matter of
24 due process concerns, what the cases tell us is that what
25 you're entitled to by way of due process is a function of

1 whether or not you are a known creditor or an unknown
2 creditor. My opponents take the position in trying to
3 enforce the 2009 order that due process wasn't violated
4 because the plaintiffs were all of them are unknown
5 creditors and for bankruptcy purposes and in terms of
6 asserting or determining whether or not you had a claim and
7 you were entitled to a certain level of due process, our
8 contention is that we were known creditors and it's not a
9 test of being forced to demonstrate what GM knew, rather
10 it's a matter of law in terms of what GM is charged with
11 knowing.

12 And GM as a car manufacturer is charged with
13 constructive notice the cases tell us -- constructive notice
14 of what's in their databases, what's in the TREAD database,
15 what's in the PRTS database. And your Honor I will tell you
16 that I think that there is a terribly important series of
17 cases that are cited in the Valukas report and they were
18 referred to in our papers and they are the report -- they
19 are the cases that are listed in Appendix A to the Valukas
20 Report.

21 And what those cases stand for is the proposition
22 that if there's a known safety defect a car manufacturer has
23 to report that to NHTSA and notify the owners. And by
24 statute we know that a defect is one that creates
25 unreasonable risk of an accident or a risk of injury or

1 death as a result of an accident. And we have a string of
2 cases there are cited to us in the Valukas Report starting
3 with U.S. v. General Motors, a district of DC case in '97,
4 and I can give you they cite. It's 565 F.2d 754, the jump
5 page is 760.

6 And in that case the court rejected the argument
7 that very few incidents were likely to occur in the future.
8 Like GM tells us that the ignition switch defect operated
9 properly for a majority of the owners. That argument was
10 rejected by the Court. It required GM to do a recall and its
11 argument was that from the beginning the part at issue there
12 didn't meet manufacturer's own standards for proper assembly
13 and absent notification will in the future cause at least
14 some operators and passengers to be confronted with a clear
15 danger. To the same effect as Dole v. Ford, the Porsche case
16 and the two other GM cases that are cited by Valukas.

17 But then we have to go on to look at two other
18 cases and in particular U.S. v. General Motors, an '83 case
19 which stands for the proposition that a car manufacturer
20 incurs a reporting obligation when it actually determined or
21 should have determined that a safety-related defect exists.
22 That's 574 F. Supp. 1047, the jump site is 1050.

23 THE COURT: Incurs an obligation to undertake a
24 recall.

25 MR. WEISFELNER: Yeah, whether it actually

1 determined or should have determined that there was a safety
2 defect and to the same effect is U.S. v. General Motors 656
3 F. Supp. 1555 out of the same court, a manufacturer can't
4 avoid its reporting requirements by intentionally failing to
5 reach a determination that a defect is a safety-related
6 defect.

7 THE COURT: So are you repeating all of this
8 because you're asking me to retreat from my tentatives that
9 I already agree with you?

10 MR. WEISFELNER: No, your Honor, again it's
11 because I'm trying to underscore the fact that if there were
12 a due process violation, and we contend there was because we
13 were known creditors, it gets us to the next issue and the
14 next issue is what manner of notice would have been required
15 as a consequence in order to avoid the due process issue?
16 And our point is if GM knew it had a safety defect then it
17 was required to give notice and since it and only it knew
18 it, it had to give notice of a type sufficient to advise the
19 claimant, not only that there's a bankruptcy proceeding and
20 a bankruptcy hearing at which your rights are going to be
21 affected, but here's the nature of your claim. Absent
22 telling people that there was a defective ignition switch in
23 their cars that was a safety defect by definition and could
24 cause the air bag non-deployment, making any accident you
25 were in even that much more severe, they could have visited

1 every single plaintiff and told them in person there's
2 bankruptcy hearing, there's a sale hearing going on and that
3 sale hearing may affect your rights.

4 Well, if I don't know what my claim is, how do I
5 know what my rights are that I need to protect? No form of
6 notice, either mailed, in person or by publication, is
7 sufficient to advise a creditor, who all these people were
8 at the time, and known creditors from GM's perspective, but
9 unknown from their own perspective that they had a claim
10 that was worthy of protection.

11 Nowhere does GM even attempt to address our
12 imputation cases. You didn't hear any of that in connection
13 with today's dissertation. Our imputation cases stand for
14 the proposition that imputation is proper, even if knowledge
15 was never communicated to senior management. Employees'
16 position within the corporate hierarchy is irrelevant for
17 imputation purposes as long as they obtained their knowledge
18 while acting within the scope of their employment and Old Gm
19 is charged with the collective knowledge of all of its
20 employees even if no single employee possessed all the
21 relevant knowledge or was individually responsible for
22 acting on it.

23 Now the best that can be said for the failure to
24 disclose what was a known safety defect and the fact that it
25 was a known safety defect is imputed to GM as a matter of

1 automobile law and general due process law in the bankruptcy
2 context, the best that can be said is that it was related to
3 the tremendous pressure that GM was under. And your Honor
4 asked the question about whether or not due process concerns
5 can change given the exigencies of the situation, the
6 melting ice cube, the need to conduct the sale before money
7 runs out.

8 Well, I think the cost issues infected GM's
9 decision. As the record reflects they were cutting costs
10 dramatically. That is part of the reason why the TREAD
11 database personnel were cut. The group charged with running
12 that database was paired down in the timeframe leading up to
13 the petition. But we think more insidious than the cost
14 issues was the cultural issues at play here. The record is
15 clear that personnel who tried to raise safety concerns
16 regarding the ignition switch defect got push back. There
17 was a fear of retaliation. You don't write reports using the
18 word stall, safety or defect and that comes from the quality
19 brand manager for the Cobalt cases themselves, cars
20 themselves.

21 Were these owners reasonably ascertainable? Based
22 on the record and based on the law the answer is yes. There
23 was no semblance of a diligent examination of GM's records
24 and database which they were required under federal law to
25 maintain which would have readily disclosed these creditors

1 and the nature of their claim. And there can't be any
2 question about GM's ability to identify the owners. Their
3 own stipulation of fact number 18 acknowledges that its
4 contract with R.L. Polk provided it with the ability to
5 obtain the names and addresses of vehicle owners.

6 And, your Honor, I couldn't do the math as quickly
7 as (indiscernible) could, but in their papers they told you
8 that direct mail notice would have cost \$42 million, but
9 that's for the 70 million cars. I don't know what direct
10 mail notice would have cost to 27 million people that may
11 have been impacted by the ignition switch, but the point is
12 they could've gotten away with and they could have cured the
13 due process violation whether it was direct mail or
14 publication by letting people know what the nature of their
15 claims were, by telling people that were involved in
16 accidents or stall situations that we know why your car was
17 involved in those situations. We have a known safety defect
18 associated with out ignition switch. But they didn't.

19 There are two leading cases on the question of
20 whether or not these were known creditors don't help them.
21 Morganstern wasn't a due process case at all. The plaintiff
22 contended there was an undisclosed design defect that gave
23 rise to a fraud on the court and your Honor concluded that
24 the pleading requirements of Rule 9(b) had not been met.
25 Allegations that GM knew of the design defect were

1 conclusory, not supported by the evidence. Quite different
2 from our case.

3 Burton again is not really a due process case. The
4 Court didn't deal with our question, were claimants known or
5 unknown. The Court assumed the successor liability shield
6 was in place and the decision therefore is one of contract
7 interpretation -- what claims were assumed versus retained.

8 Your Honor, quite frankly, the content of your
9 Honor's sale order is irrelevant to parties to whom due
10 process was denied -- all of it including whatever your
11 Honor may have said or found or determined with regard to
12 successor liability. That's ultimately, if your Honor agrees
13 that our rights were impacted such that the order should not
14 be a bar to our pursuit of claims, are to be determined by a
15 court of competent jurisdiction.

16 Your Honor, Drexel tells us --

17 THE COURT: Which you're saying I'm not.

18 MR. WEISFELNER: Your Honor is not with regard to
19 the remedy that the plaintiffs seek in either of their two
20 consolidated complaints. Your Honor's role, I would suggest,
21 is to determine whether or not your Honor's sale order in
22 2009 serves as a bar to the prosecution of those litigations
23 which is obviously a core function of your Honor. It's your
24 order. It's yours to interpret. But I do think that because
25 there was a violation of due process, these were known

1 creditors who weren't given any semblance of notice that
2 would satisfy due process, those orders cannot be used to
3 bar prosecution of their claims.

4 Now, Mr. Esserman and Mr. Weintraub will talk
5 about something other than the presale plaintiffs and
6 especially those involved in the economic loss scenario.
7 Even those plaintiffs involved in the economic loss scenario
8 do have direct claims against New GM that, I respectfully
9 submit, were not intended to be and could not have been in
10 effect precluded by virtue of the sale order. This is an
11 effort by New GM to get a get out of jail free card. There
12 were direct obligations.

13 THE COURT: Well, forgive me Mr. Weisfelner, but
14 aren't both sides looking for a get out of jail free card?
15 You're looking for a get of jail free card on successful
16 liability provisions that were argued by different guys and
17 the GUC Trust says there are eight people in Mr.
18 Weintraub's. I don't know if it's that limited or not. But
19 all of the other people who were in car wrecks have
20 prepetition claims and the folks in Mr. Weintraub's group
21 who are asserting the same prepetition claims are saying
22 that they get a get of jail free card from a ruling that I
23 issued on exactly the same arguments were made back in 2009.
24 That's (indiscernible) and (indiscernible) Philadelphia
25 (indiscernible) and a bunch of others.

1 MR. WEISFELNER: And --

2 THE COURT: So let's try to be fully attentive to
3 the fact that it may be both sides in this case that are
4 overreaching.

5 MR. WEISFELNER: Well, your Honor, let me try my
6 best to address that because I understand your Honor's issue
7 with regard to the arguments that were made on successor
8 liability and, your Honor, all I'm suggesting is that were
9 your Honor to determine that the 2009 order does not bar
10 these plaintiffs from pursuing claims in courts of competent
11 jurisdiction on whatever theory they may ultimately espouse
12 it will be up to Judge Furman to decide whether or not
13 successor liability standards are met.

14 For all of the reasons Mr. Steinberg indicated, he
15 may very well conclude that the plaintiffs don't meet or
16 exceed the threshold pleading standards on successor
17 liability. I think they do. But beyond successor liability
18 theories, the plaintiffs in the presale cases have
19 recognizable claims that run directly against New GM.

20 Let's not forget, and this sort of goes back to my
21 thesis that you can't do a do over, for five years following
22 the sale, New GM failed to disclose what it knew, what it's
23 charged by law of knowing and that is that the ignition
24 switch defect in the presale cars was dangerous. That
25 failure to disclose is separately and independently

1 actionable and your Honor's sale order could not have,
2 should not have, and in our view did not as a matter of law
3 extend to provide New GM with a cleansing of liability for
4 whatever theory the plaintiffs may be able to assert that a
5 court of competent jurisdiction will ultimately determine is
6 valid or invalid.

7 And it's not just successor liability type claims
8 that the pre-sale plaintiffs would rely on. But because
9 there was a due process violation here the only effective
10 remedy, the only remedy that the case law tells us is
11 applicable, is that the order can't be enforced against
12 them. And the notion that we'd have to prove that we would
13 have a different result is first of all, not what the case
14 law provides. It's not what Fuentes provides and it's not
15 what the other cases we cited in our brief provides. There's
16 no such thing as a no harm no foul due process violation.

17 Beyond that, and the cases are legion that talk
18 about the impropriety of using hindsight or speculation to
19 determine what would have happened had we rolled back the
20 clock. What would have happened had treasury determined that
21 there was a five-year long cover up of a dangerous situation
22 involving a line of cars that had caused fatalities, that
23 have caused serious injuries, and I know your Honor doesn't
24 like to hear it, but it had an individual convicted of
25 manslaughter for killing her fiancé and other egregious

1 situations, had treasury that that was the fact and had
2 treasury been aware that the cover up would go on for
3 another five years, do I know whether or not playing chicken
4 with treasury at that point to get him to change their line
5 in the sand on what was commercially necessary for New GM to
6 survive, what sort of public firestorm, congressional
7 inquiries, attorney general investigations would we all have
8 been treated to in 2009 that we were treated to in 2014 that
9 may have impacted whether or not treasury, who again is a
10 functionality of taxpayer base and its taxpayers implicated
11 and affected by this cover up, what they would've done to
12 preserve GM and to avoid a liquidation.

13 It's just as reasonable to expect that they would
14 have changed the line in the sand they drew to include the
15 claims and only those claims that were impacted by the five
16 year known ignition switch defect safety defect that was
17 undisclosed by GM in violation of their obligations under
18 federal law.

19 I don't know what would have happened had those
20 facts been raised. With all due respect, I don't know what
21 your Honor knows for a fact what would have happened. That's
22 why the case that tells us don't speculate. Don't take a
23 hindsight view. It's enough if due process was violated.
24 We're not going to go through the process of attempting to
25 do a do over, especially in this case because I think a do

1 over would require us to in effect go back to the future
2 again to figure out whether or not they'd be entitled to a
3 363(m) order if we know in advance they're going to maintain
4 the cover up for another five years.

5 Your Honor again, I don't need to remind your
6 Honor what the briefs say on whether a creditor who is
7 notified of the bankruptcy or is aware of the bankruptcy is
8 in the same position with regard to their claim if they're
9 never told about the claim as a creditor who has notice of
10 the claim, but not of the bankruptcy. That's Waterman,
11 that's Tillman and they haven't told you any cases that
12 stand for any different proposition.

13 Again, as the Second Circuit in Chateaugay
14 teaches, to expect claims to be filed by those who have not
15 yet had any contact whatsoever, what the tort fees are, has
16 been characterized as absurd. Mr. Steinberg argued that
17 well, but you did have contact with GM -- you bought the
18 car. Well, but no one told me that the car I bought had a
19 hidden, known but undisclosed safety defect so how did I
20 know I was supposed to file a claim?

21 And your Honor, I will tell you that I don't think
22 it's necessary to spend a lot of time on the contention
23 asserted by GM that somehow 363 sales provide some sort of
24 due process exception. A proposition of claims is supported
25 by the Edwards case. I think Mr. Steinberg made reference to

1 Edwards by my count seven times during his oral argument out
2 of the Seventh Circuit and his brief they also cite to the
3 Paris case out of the District Court of I think it was
4 Maine.

5 Well, your Honor, obviously neither Edwards nor
6 Paris is controlling. Both have been criticized if not
7 overruled in the case of Paris, and Edwards was criticized
8 in a number of cases including Excel Concrete, Savage
9 Industries and the Second Circuit has only recently
10 reconfirmed the applicability of due process concerns in
11 bankruptcy proceedings in the Colt case.

12 And your Honor, our brief had a laundry list of
13 due process cases in the 363 context, five of which your
14 Honor pointed out. But in addition to those five, you have
15 National Type, Folger, Excel, Savage Industry, Reiner in
16 addition to the Metzger case that your Honor pointed out,
17 Compak and the others. There's also Schwinn Cycling and
18 Ninth Avenue v. Remedial Group -- all of which stand for the
19 proposition that due process pertains in a 363 sale
20 notwithstanding the need for finality, notwithstanding the
21 circumstances that generally surround the 363 sale. And of
22 course, your Honor, you then have Grumman. And lest there be
23 any confusion, we collectively represent not only plaintiffs
24 in the presale complaint, but plaintiffs in the post-sale
25 complaint and the point that was made in our papers and in

1 particular in the GUC Trust papers that at least as to
2 people that didn't buy a car until after the 2009 order was
3 entered, no way to give those people notice. They weren't
4 contingent creditors. They were the future creditors that
5 Grumman spoke to and they couldn't have gotten adequate
6 notice and as a consequence as a matter of due process the
7 2009 were cannot be read against them.

8 What remedies they may ultimately have for the
9 injuries they complain of will be determined by a court of
10 competent jurisdiction. And, your Honor, you did cite the
11 Lane Hollow in your opening questions. We think Lane Hollow
12 and Fuentes are the cases on you don't look for prejudice.
13 There's a, in effect to ask a question about whether or not
14 in that particular case due process would have led to a
15 different result is not the issue that we're supposed to be
16 focusing on. We're supposed to avoid hindsight and pure
17 speculation.

18 Your Honor, as I think about it the prejudice, if
19 one wants to focus on it, in this particular case is very
20 acute. Not only didn't we have the opportunity in effect to
21 convince treasury that under the egregious and special
22 circumstances of this case their line should have been
23 moved, but so much has been written about and so much talked
24 about cases in 363 where listen, understand that what we're
25 doing is we're converting your claims against the debtor

1 into a pot of proceeds that came to use from the sale and
2 when you think about it, if your claims get to attach to the
3 proceeds and otherwise in the absence of the sale there
4 would have been a liquidation and proceeds to realize, how
5 you really prejudice.

6 Well, the amazing thing about this case that no
7 one seems to focus on, or at least New GM doesn't in its
8 papers, is the bar date followed the sale by a period of
9 time. By the time the bar date showed up no one at Old GM
10 and nobody at New GM who is now in possession of all of the
11 books and records, the same books and records that is the
12 matter of federal law, mandated the conclusion that they
13 knew there was a safety defect with regard to the ignition
14 switch defect, told any of the plaintiffs listen, now we're
15 down to the bar date, this is real serious stuff. 363 we
16 could, your Honor, not pay that much attention to because
17 there are exigencies and we've got melting ice cubes and
18 we've got to sell fast, but here's the bar date. So now
19 we're really going to make sure that you know about your
20 claims so that you have the right to attach yourself to the
21 proceeds. That didn't happen in this case, judge. And if
22 we're going to do a do over, I would assume part of the do
23 over is we get a record that would make sure that claimants
24 knew the nature of the defect, knew what their claims were,
25 had an opportunity to assert a claim.

1 The barn door has been open for an awfully long
2 time. The amount of value in the GUC Trust has been
3 substantially dissipated. Our opportunity to get back into
4 the fold and realize the same pro rata distribution as other
5 affected general unsecured creditors doesn't exist through
6 no fault of our own.

7 THE COURT: Well, when you say no fault of your
8 own, this is a good time for you to answer the question I
9 asked at the outset which is that when Ms. Rubin and her
10 clients made it pretty clear that there was going to be an
11 upcoming distribution you didn't act.

12 First of all, I assume that you're not disclaiming
13 notice or of the fact that there's court where you could
14 have made an application to me to block that distribution
15 and most likely gotten it in a heartbeat.

16 MR. WEISFELNER: And most likely have --

17 THE COURT: Got me to tell Ms. Rubin to wait
18 before making further distributions in a heartbeat.

19 MR. WEISFELNER: It wasn't an easy decision and
20 not one that was decided by me or my office. In point of
21 fact the fact of the impending distribution was first
22 brought to us, if I recall, by New GM's counsel and New GM's
23 counsel suggested that we may want to seek to hold up that
24 distribution and our reaction was well don't you have an
25 obligation as well since you're saying that the remedy that

1 the Court ought to fashion is against New GUC Trust, why
2 isn't it your obligation to seek the Court's intervention to
3 hold it up and in fact there was correspondence that was
4 crafted and sent to Ms. Rubin and her clients which
5 suggested that it would be inappropriate for her to make
6 that distribution.

7 And, your Honor, there was a consideration of what
8 the standards were for injunctive relief and I appreciate
9 after-the-fact your Honor telling us that we would get it in
10 a heartbeat, but there was concern about the cost and
11 expense associated with meeting the preliminary injunction
12 standards.

13 Now, I will also tell your Honor, lest you
14 continue to look at me like I have two heads, yes there was
15 a strategic element to the decision that was taken on our
16 side. That's my point of view. It's kind of disingenuous,
17 one would have argued within the confines of the attorney
18 client privilege, but you can assume that the argument went
19 something like we're taking the position that we're not
20 required, to pursue to the exclusion of every other remedy,
21 our claims against the GUC Trust. So now to prevent the GUC
22 Trust to making what amounts to a diminimous distribution in
23 light of the totality of the consideration that they ever
24 had and we had a very short window of time after they told
25 us that they weren't going to voluntarily stop, yes your

1 Honor, the decision was made not to pursue it.

2 THE COURT: You're not seriously suggesting to me
3 that in your fairly illustrious career you've never been
4 able to get out a TRO request in this kind of time.

5 MR. WEISFELNER: Your Honor, again, it wasn't a
6 function of whether we could get out a TRO request, it was a
7 function of whether or not we'd prevail. And, your Honor
8 again, hindsight is 20/20 and there were many people on our
9 side of the table that thought that a TRO was appropriate.
10 There were people at New GM that at one point thought a TRO
11 was appropriate and for better or for worse for strategic
12 reasons or otherwise the fact of the matter is that we did
13 not attempt to prevent the GUC Trust from making a
14 distribution.

15 That doesn't change the fact that by the time of
16 the recalls, by the time the plaintiffs got organized and
17 began their litigation, by the time we were retained in this
18 case, a substantial majority of the funds originally in the
19 GUC Trust had been dispersed to GUC Trust beneficiaries and
20 it would have been impossible or very close to impossible to
21 put the ignition switch defect plaintiffs back in the same
22 position they would have been in had they been given enough
23 information to file a claim before the bar date.

24 And, your Honor, all of that says nothing about
25 the contention, with which we disagree, that the GUC Trust

1 has raised with regard to equitable movements. Your Honor,
2 again, we are not seeking a reversal or a modification of
3 your Honor's order or the 363(m) finding, although once
4 again if we were doing a do over and we were to know in 2009
5 everything we know today, I don't know how you'd take into
6 account the fact that New GM would for a period of another
7 five years fail to disclose what by law it was charged with
8 knowing constructively or actually about the ignition switch
9 defect and how that may have impacted your Honor's
10 determination.

11 The lack of notice and an opportunity to be heard
12 is what makes the plaintiffs not bound by the sale order and
13 free to pursue their state law claims against New GM. Now, I
14 also have to point out that the claims regarding cars
15 manufactured and sold by new GM, I think new GM concedes are
16 not subject to this sale order, and claims regarding cars --

17 THE COURT: Say that slower, because it's a matter
18 of considerable importance.

19 MR. WEISFELNER: All right.

20 THE COURT: Which claims are not subject to the
21 sale order?

22 MR. WEISFELNER: Claims regarding cars that were
23 manufactured and sold by new GM.

24 THE COURT: Oh. I think that's right. Mr.
25 Steinberg can confirm that, but I thought that has never

1 been an issue.

2 MR. WEISFELNER: Well, I think I heard him say
3 that, to the extent that new GM sold a car, but it contained
4 a part designed or manufactured by old GM --

5 THE COURT: That's a different issue because the
6 order said cars or parts, and that is what I was asking both
7 sides to focus on.

8 MR. WEISFELNER: Yeah, and again, Your Honor,
9 again, by way of demonstration of prejudice, I think, that
10 had the Plaintiffs known about the ignition switch defect,
11 known it had been around for five years, known that it was a
12 safety defect, known that it caused airbag non-deployment,
13 known that the part may be continued to be installed in cars
14 that were going to be sold by new GM, we would have pressed
15 for an appropriate carve out in the sale order to insure
16 that a known safety defect not be replicated and continue to
17 be incorporated into cars that are about to be sold. Using
18 a switch with a known safety defect was new GM's choice, and
19 new GM bears liability for that decision.

20 THE COURT: To what extent to I have evidence in
21 record telling me the extent to which old GM ignition
22 switches were stuck in new GM cars, or installed in new GM
23 cars? That was one of the things I was trying to grope at
24 in my earlier questions.

25 MR. WEISFELNER: Your Honor, to be frank with you,

1 I don't know what the record is about new GM cars that had
2 old GM ignition switches, which is either purposefully or
3 accidentally installed in them. They were switched out at a
4 third-party repair place. And frankly, I would think that
5 that sort of inquiry, that kind of discovery, would take
6 place at the MDL and would ultimately be determined as a
7 matter of fact by Judge Furman. But sitting here today, I'm
8 afraid I can't tell you because I don't know any part of the
9 record that tells us how many new GM vehicles had old GM
10 parts. The other point to make, I think, Your Honor, is
11 that these Plaintiffs hold the claims under state --

12 THE COURT: Which Plaintiffs?

13 MR. WEISFELNER: Primarily, the Plaintiffs in the
14 post-sale complaint, hold claims under state consumer
15 protection laws, arising out of new GM's failure to comply
16 with its obligations under the Safety Act. Doesn't require
17 us to be private Attorney Generals under the Tread Act or
18 the Safety Act. Rather, as is contended in the complaint,
19 and in some of the complaints filed, for example, in Arizona
20 and California by various Attorneys General, it is the
21 violation of Federal law, which is a predicate for the
22 contention that there has been a violation of State consumer
23 laws, and I don't think that new GM got, saw to get or, Your
24 Honor, intended to give them a pass on their post-sale
25 alleged violations of consumer protection laws in the

1 various states.

2 Your Honor, my bottom line point is, and I think,
3 again, this sort of gets down to a policy question, and Your
4 Honor, I agree that we need to be concerned about what gets
5 said and done about 363 sales, especially 363 sales that are
6 done in emergent situations, for Debtors that are on the
7 verge of dissolution in the absence of the only deal that's
8 being made available to them. But I do think that this is a
9 very, very narrow carve out. We are looking for a situation
10 where we have a Debtor, a car manufacturer, who knows and is
11 charged with constructive knowledge, that it has put into
12 the marketplace, and on the highways and byways of this
13 country, cars with a known safety defect. And in that
14 context, in order to have the 363 sale happen, with parties
15 being able to protect their rights, they've got to give
16 adequate notice of the existence of the claims that arose as
17 a consequence of having sold those cars with a known safety
18 defect, and the failure to give that notice, whether it be
19 by publication or direct mail, is an unremedial violation of
20 due process. The notion that you have to show prejudice,
21 it's not in the case law. Talk about being bound by Second
22 Circuit authority, it's not in the Supreme Court authority.
23 You don't have to show prejudice. The prejudice cases they
24 talk to you about are all cases that say, "You can glom onto
25 the proceeds of the sale."

1 That's chutzpah in this case, Judge, with all due
2 respect, because roll forward to the bar date. These
3 Plaintiffs were in no better position to file a claim based
4 on what GM knew and failed to disclose. So how can you say,
5 "No harm, no foul, you just attach to the proceeds" when I
6 couldn't attach to the proceeds because I didn't know I had
7 a claim. And the same can be said, by the way, for the
8 discharge of the case, or the discharge of the company, when
9 the case confirmed.

10 THE COURT: Well, time out. I take it we agree
11 that there's no discharge in a liquidating 11.

12 MR. WEISFELNER: We agree that there's no
13 discharge on a liquidating 11.

14 THE COURT: So what discharge are you making
15 reference to?

16 MR. WEISFELNER: Your Honor, I'm just talking
17 about from a policy perspective, to have a Debtor who sells
18 assets and continues on in business, not our -- not this
19 case. So I won't focus on it. I'll just focus on the fact
20 that the prejudice that befell our clients was multifold,
21 and can't be remedied. First of all, to the extent that you
22 followed the cases, and I think you have to, that says that
23 a due process violation doesn't require a demonstration of
24 prejudice. You don't have to show that you would have won.
25 Couple that with the fact that it's our position that, had

1 the firestorm that we saw happen in 2014, because of the 12-
2 year non-disclosure of the safety defect, been on the record
3 as of the time of the sale hearing, I believe it's just as
4 reasonable to suspect that the line drawn in the sand by the
5 Treasury would have changed. And the last form of
6 prejudice, I think, that we can't overlook is the fact that,
7 come the bar date, new GM or old GM continued to fail to
8 give us any indication that we had claims based on a known
9 safety defect that existed in all of the cars, that they
10 refused to give anybody notice of, and they were charged
11 with knowing it as a matter of law. Your Honor, I want to
12 reserve enough time for both rebuttal and for my co-counsel.

13 THE COURT: Well, let me hear from Mr. Esserman
14 and Mr. Weintraub next.

15 MR. WEINTRAUB: Good morning, Your Honor. Between
16 Your Honor's questions and Mr. Weisfelner's presentation,
17 I've been taken way off of my outline, so I'm going to try
18 to address some of the things that Mr. Weisfelner --

19 THE COURT: All right, let me interrupt you for a
20 second --

21 MR. WEINTRAUB: Sure.

22 THE COURT: -- Mr. Weintraub, and to help guide
23 you. I would like you to help me understand what are the
24 things you're talking about, also what categories they're
25 in. Are they people who never got to get any kind of claims

1 in against old GM, or were they those, like, a separate
2 pleading that I got after most of all of the briefing was
3 done, are looking for the opportunity to re-negotiate
4 settlements because their cases may have been stronger than
5 they thought they were, or are they in some further
6 category? I think you're ahead, subject to Ms. Rubin's
7 ability to be heard on the fact that you might be entitled
8 to some kind of (indiscernible) style relief, and the
9 opportunity to file claims if you didn't get to do that, but
10 you're still behind on your ability to go after new GM
11 because other people very similarly situated made these same
12 arguments you're making about successor liability and they
13 lost. So, argue accordingly.

14 MR. WEINTRAUB: Sure. Well, let me start with
15 what I think was the first question, Your Honor. We think
16 the number is at least 150 people. I don't know where they
17 four or eight people came from. One of the actions filed in
18 front of Judge Furman is an action that was filed by Robert
19 Hilliard that covers 140 people and that's just --

20 THE COURT: Okay. And those are 140 people joined
21 rather than a class action?

22 MR. WEINTRAUB: I think that was filed as a class
23 action, actually, Your Honor.

24 THE COURT: Okay, a class action to get into
25 adjudication on the common issues, and then to deal with

1 their individual specific ones thereafter?

2 MR. WEINTRAUB: That's what I think, Your Honor.
3 There's an exhibit to that complaint. The complaint alleges
4 they're all pre-sale accident victims. Some of them are
5 fatalities, some of them are injuries, all of them, as I
6 said, occurred before the sale hearing.

7 THE COURT: And pause once again, my apologies.

8 MR. WEINTRAUB: I'm sorry?

9 THE COURT: I assume that under Reading Vs. Brown,
10 a narrow subset of your group, if any are in that category,
11 if they were hurt after the filing on June 1st, 2009, but
12 before the sale, they'd have admin claims against old GM,
13 but they'd still be claims against old GM.

14 MR. WEINTRAUB: Your Honor, our position is that
15 we don't think we should be barred by the successful
16 liability shield, with respect to the legal point you're
17 making, that may be correct. I don't represent any of those
18 parties, so I don't have the particulars of those cases to
19 know whether or not anybody fell within that, that --

20 THE COURT: That window, so to speak.

21 MR. WEINTRAUB: Right. But, Your Honor, with
22 respect to what Mr. -- if I'm pronouncing his name
23 incorrectly, I apologize - Jakubowski argued, Mr. Jakubowski
24 argued lack of subject matter jurisdiction, and he argued
25 that, as an academic issue, not as a -- based upon what was

1 actually going on, or the undisclosed issues in the case.
2 So what Mr. Jakubowski was arguing was, this Court did not
3 have subject matter jurisdiction. You had ruled, in your
4 sale order, that you did have subject matter jurisdiction
5 because you could sell free and clear of in personam claims
6 under Section 363(f), you relied on Chrysler, which in turn
7 relied on TWA, and the District Court on appeal, even though
8 that appeal was dismissed as being moot because Mr.
9 Jakubowski did not try to get a stay pending appeal, did go
10 to the merits and say, "We've looked at this issue, and we
11 think that there was subject matter jurisdiction." We are
12 not questioning subject matter jurisdiction. That ship has
13 sailed.

14 Our issue is completely and solely the due process
15 issue of whether or not we should be bound by the successor
16 liability shield, and the reason that we don't think we
17 should be bound by the successor liability shield is because
18 we were unaware of the ignition switch defect that had a
19 seven-year history within old General Motors. And I won't
20 repeat everything that Mr. Weisfelner said, but there are
21 internal reports, there was as we noted in our brief, the
22 Wisconsin State Trooper report which actually figured out
23 the connection between the airbags not deploying and the low
24 torque in the ignition switch, and that was all in old GM's
25 files. We think that everyone who had that -- the affected

1 vehicle, had an ignition switch defect, because that defect
2 was in the DNA of every one of those manufactured vehicles.

3 So, as Mr. Weisfelner said, you've got this group
4 of potential Plaintiffs that all had that ignition switch
5 defect, and they all had a right to have that car repaired.
6 We're in a special subgroup of that. Not only did we have
7 that defect, but that defect manifested itself in the form
8 of an accident. And clearly, because we had an accident, we
9 were aware that we had a claim. What we were not aware of,
10 Your Honor, was that causation was due to the ignition
11 switch defect, that the ignition switch defect was the fault
12 of General Motors. Causation and fault --

13 THE COURT: Pause, please. In substance, you're
14 saying you knew you had a claim, but you didn't know how
15 strong your claim was.

16 MR. WEINTRAUB: I knew -- let me amend that. I
17 knew I had an accident. I didn't know why I had it. It
18 could have been my fault, it could have been an act of God.
19 What GM knew, what we contend GM knew, was it was the result
20 of the ignition switch defect, which it knew was in the
21 vehicle, and which it knew was in the vehicle before I had
22 the accident. Not only did they not tell me about the
23 ignition switch defect before I had the accident, they
24 didn't tell me about that defect after I had the accident.
25 Had I known about that ignition switch defect, that sale

1 hearing would have been a very different hearing, and as Mr.
2 Weisfelner said, you can't get in your time machine and see
3 what would have happened and that's why the Court shouldn't
4 speculate.

5 We had a different analogy in our complaint, and
6 we said imagine the firestorm that would have occurred had a
7 whistleblower on the eve of the sale hearing come forth with
8 all of the information in the DeLuca report. And that's why
9 we contend that it's unknowable what would have happened at
10 the sale hearing, it's unknowable what the Federal
11 government would have done. Would the Federal government
12 have continued to try to ram through a sale free and clear
13 of successor liability, knowing that this ignition switch
14 defect had been withheld from the public and from vehicle
15 owners for seven years? That's speculative, but I think we
16 should get the benefit of the doubt on that, and the
17 inference on that.

18 Why? It's very clear, Your Honor, that any sale,
19 notices are a very important issue for the due process
20 reasons. Notice was that, the timing of the sale, the form
21 of the sale motion, the form and content of the notice, were
22 all controlled by both new GM and old GM. This case
23 wouldn't have filed when it filed unless the government
24 said, "We're ready to file." This sale motion was set on
25 the government's timetable. In any sale, notice is

1 important, not just to the seller because the seller has the
2 information, but because the notice is critical to the
3 buyer. It's the buyer that wants to bind people with the
4 results of the sale hearings, and either new GM or Treasury
5 or whoever was lackadaisical, lazy, negligent or didn't
6 care, but they should have been, just like any other
7 commercial buyer is, in any other sale that I've ever been
8 involved in, very involved in making sure that that form of
9 notice and the scope of the notice is adequate.

10 What should have the notice said here? The notice
11 should have said, there's an ignition switch defect in these
12 vehicles. This ignition switch defect causes unexpected
13 stalling, which would result in loss of power to the
14 steering, loss of power brakes and the inability of the
15 airbags to deploy. With that information, people would have
16 been able to come to Court and make an effective argument
17 against successor liability. What kind of arguments would
18 people have made against successor liability? Clearly,
19 unclean hands would have been an issue. Clearly, whether or
20 not it would be equitable to sell free and clear of
21 successor liability claims in circumstances like this one,
22 where the buyer had -- I'm sorry, the seller had withheld
23 the information for seven years before the sale. This would
24 have been a maelstrom of a hearing, even much more
25 contentious than the hearing that we actually had. And by

1 saying that new GM gets to hide behind the sale order, let's
2 think who was involved in putting together the notice in the
3 first place. The notice was put together by old GM. What
4 old GM knew was a nanosecond after the sale closed, it was
5 going to be come new GM. It wanted nothing more than to
6 leave these liabilities behind, so it didn't disclose. Not
7 only did it not disclose, it wasn't disclosed for another
8 five years after that.

9 So you would be rewarding the conduct of old GM as
10 it morphed into new GM by saying that new GM is not subject
11 to these successor liability claims. You've got the very
12 same people that populated old GM and were investigating the
13 ignition switch defect, are now populating new GM. It's
14 efficient to say that they're separate companies and that
15 there's no connection between old and new GM. There's a
16 very close connection between old and new GM, and to reward
17 new GM, which is just old GM in a new bottle, for the lack
18 of disclosure, would be inappropriate, in our view. Which
19 again, is one of the reasons why, if you're going to go and
20 look at prejudice, which, as Mr. Weisfelner says, and we
21 agree, is not something that the Court weighs when you're
22 looking at a due process violation, I think the due process
23 violation is just being deprived of the opportunity to be
24 heard in a meaningful way when it matters. That was the
25 violation. Not that we would have won anyway or we would

1 have lost anyway. We were deprived of the opportunity to
2 make our best arguments when they really mattered. But the
3 reason that it's not prejudicial to new GM is, like I said,
4 new GM could have been more involved in the notice and it
5 wasn't, and new GM is populated by the same people as old
6 GM. So, when you weigh the equities here, we think the
7 equities weigh in our favor. In terms of the Manville
8 remedy, this is not a Rule 60(b) proceeding. My clients
9 didn't make a motion. I didn't file a motion. Mr.
10 Weisfelner didn't file a motion. GM filed a motion to
11 enforce --

12 THE COURT: Yeah, pause, please, Mr. Weintraub.
13 If we were looking only at the face of the order that Mr. --

14 MR. WEINTRAUB: Steinberg?

15 THE COURT: No -- but I was thinking of somebody
16 else, but it is Mr. Steinberg.

17 MR. WEINTRAUB: That's (indiscernible), Your
18 Honor.

19 THE COURT: But Mr. Steinberg is trying to
20 enforce. Mr. Steinberg wins. Your point and Mr.
21 Weisfelner's point, and I suspect it will be Mr. Esserman's
22 point, is that I can't limit the analysis to what the sale
23 order says, that it may be the start, but it's not the end
24 of the discussion. So then, I have to see, at least focus
25 on the extent to which Mr. Steinberg should lose not the

1 standing -- what his sale order says, and then the issue is,
2 not so much a matter of constitutional law, but Federal
3 civil procedure and its bankruptcy procedure counterpart, as
4 to whether the second phase of that enquiry, blowing away
5 the order, requires attention to 60(b), and its bankruptcy
6 cousin, 9024. So, I'm not persuaded that your failure to
7 invoke 60(b), or Mr. Weisfelner's or Mr. Esserman's, is
8 conclusive. What Mr. Steinberg is saying in substance is,
9 "Hey, you guys, once you're asking me to look at the pha --
10 asking the Judge to look at the phase II part of the
11 inquiry, you've got to turn to 60(b) doctrine." Help me
12 with that.

13 MR. WEINTRAUB: Sure. Let me start with the first
14 thing you said, which, if you apply the terms of the sale
15 order, we lose. The sale order was based on an incomplete,
16 deficient record. You can't look at the sale order, you
17 can't look at the findings that were made in July of 2009
18 and ignore what was going on and not disclosed to the Court
19 from 2002 to 2009. You just can't. The DeLuca report tells
20 you that there was a whole lot of stuff that you didn't
21 know, that may have changed your mind in July of 2009. So,
22 saying that the order should be applied in accordance with
23 its terms without regard to all of the undisclosed
24 information really, to me, Your Honor, doesn't make sense
25 and it's not equitable. And in terms of Rule 60(b), we are

1 not required to pursue a particular remedy. The remedy that
2 we have pursued is the remedy that the Second Circuit has
3 given to us in Manville, and the remedy in Manville, didn't
4 require Rule 60(b). It didn't require a Rule 60(b)
5 analysis, it didn't require a showing of prejudice. It just
6 said, "If you didn't get constitutionally sufficient notice
7 of the order. You're not bound by the order."

8 THE COURT: Well, let's talk about that --

9 MR. WEINTRAUB: If I could just --

10 THE COURT: Pause for a second. It didn't say
11 whether or not you had prejudice, but Chubb in that
12 situation was plainly prejudiced. That was a no-brainer,
13 wasn't it?

14 MR. WEINTRAUB: And Your Honor, I know you're
15 going to disagree with me, I was plainly prejudiced too,
16 because but for that successor liability shield, I had a
17 successor liability claim that I could have asserted against
18 new GM. Maybe I would win, maybe I would lose. Mr.
19 Steinberg says there is no merit to those claims because
20 he's focusing on mere continuation. There are other
21 theories of successor liability, including product line
22 cases which would apply to my clients because they were
23 injured, and there is a fraud exemption, and there are all
24 kinds of penumbras to fraud, and one of the penumbras may be
25 the non-disclosure of the ignition switch defect for seven

1 years, so it's putting the cart before the horse to say I'd
2 lose on successor liability. My point is that I was never
3 given the chance to, number one, oppose the successor
4 liability shield at a time when my opposition would have
5 mattered, before the transaction closed, and I was -- and
6 because of the sale order, I am now precluded from ever
7 bringing that successor liability claim. So what I lost, as
8 you said earlier, was a collateral source. And we were
9 talking about the successor liability cases being -- and
10 Amaro in particular, which I can get to in a minute. When
11 you were talking about Amaro, you said you disagreed with
12 the underlying premise that those claims belong to the
13 Debtor, and in fact, probably did belong to the individual
14 claimants. When this sale closed, I would have had a
15 successor liability claim, but for that shield. And another
16 important point, because this is kind of stream-of-
17 consciousness at this point, when you get to Section 363(m),
18 what Section 363(m) -- and I know this is not appeal, but
19 Mr. Steinberg argued the policy of 363(m). When you get to
20 Section 363(m), Section 363(m) does not bar appeals. What
21 Section 363(m) says is, reversal or modification on appeal
22 does not affect the validity of a sale. What happened in
23 this sale was much more than the mere transfer of title.
24 This sale had another very shiny Christmas tree ornament
25 sitting on it, and that Christmas tree ornament was the

1 successor liability shield. So, even if this was an appeal
2 and a Section 363(m) situation, I don't think anybody is
3 arguing that no matter what you throw into a sale order, it
4 can't be reversed on appeal. The language of 363(m) itself
5 anticipates a reversal or modification on appeal, because it
6 says a reversal or modification on appeal does not upset the
7 validity of the sale. So, my point is, Your Honor, that
8 there are lots of things that happen in a sale that are not
9 part of the transfer of title. I don't disagree that it was
10 not a condition set up by the Treasury that it be free and -
11 - that the sale be free and clear of successor liability,
12 but you can't trump someone's due process rights by putting
13 conditions into a contract by making the agreement
14 convoluted, by saying that it's too expensive to give 70
15 million people first class mail notice. From our
16 perspective, they could have done a lot of things to give us
17 notice. Even though we were known Creditors and entitled to
18 first class mail notice, publication notice, which
19 identified the nature of the defect and the effect of the
20 successor liability shield on injured people would have been
21 sufficient, we think, and that's the difference between what
22 happened in the Waterman case, because in Waterman, what the
23 Court held was that people who had not yet exhibited
24 symptoms could not be bound by a sale -- published sale
25 notice that didn't even mention asbestos. What this Court

1 did in Chemtura in order to bind people who had not yet
2 developed symptoms but had been exposed to the chemical was,
3 this Court required very targeted notice that was explicit -
4 -

5 THE COURT: Yeah, but as you know, when you're
6 talking about this Court, Mr. Weintraub, that wasn't just
7 the Southern District of New York, that was Gerber.

8 MR. WEINTRAUB: Well, that's what I meant by this
9 Court, Your Honor.

10 THE COURT: And if a Judge tries to implement what
11 some, in other environs, call best practices, that doesn't
12 necessarily provide the yardstick by which constitutional
13 due process is measured.

14 MR. WEINTRAUB: Your Honor --

15 THE COURT: Now, Chemtura was a reorganized Debtor
16 case and was also an objection to claim case, and I wonder,
17 for those reasons, whether what I thought was a good idea in
18 Chemtura, and I later learned that my good idea was good
19 enough to measure what was satisfactory due process provides
20 the yard stick.

21 MR. WEINTRAUB: So did Judge Furman, Your Honor.

22 THE COURT: I'm sorry?

23 MR. WEINTRAUB: So did Judge Furman.

24 THE COURT: Yeah, I think he was the guy who
25 referred me on it.

1 MR. WEINTRAUB: He did. He liked what you did.

2 THE COURT: Okay. But how much does that help us
3 here?

4 MR. WEINTRAUB: I think it helps us here, Your
5 Honor, because it informs a kind of notice that we think
6 should have been given, either by first class mail or by
7 publication notice, and you know, we're knocking ourselves
8 out with hypotheticals. Let me give you a hypothetical.
9 What if --

10 THE COURT: Time out. You can ask yourself the
11 hypothetical, but part of the rules that we go under is that
12 you can't give me a hypothetical.

13 MR. WEINTRAUB: Okay. I'll give myself a
14 hypothetical.

15 THE COURT: Okay.

16 MR. WEINTRAUB: If I were the Judge in the General
17 Motors case and GM had filed a notice of sale with me, and a
18 motion to approve the form and content of notice and said,
19 "Oh, by the way, we've got this little ignition defect --
20 switch defect problem. We've been working on it for seven
21 years. 30, 40 people have been killed, been a bunch of
22 accidents, we want to sell free and clear of that and we
23 want to bar successor liability claims. We don't want to
24 say in our sale notice there's an ignition switch defect
25 that causes unexpected stalling and loss of power steering

1 and power breaks and airbag disengagement. That's just too
2 much information. You know, those four or five sentences,
3 that could add maybe \$1000 dollars to our mailing. So Your
4 Honor, Mr. Weintraub, Judge Weintraub, would you approve
5 this form of notice as being good and sufficient, even
6 though we don't mention the ignition switch defect?" I
7 don't think I would have done that, Your Honor. But
8 unfortunately, I think that's the equivalent of what
9 happened here. We think that's a violation of due process,
10 and we think it's unfair. Can I address Amaro for a moment?

11 THE COURT: Oh, sure.

12 MR. WEINTRAUB: Unless you have other questions
13 for me. I was thrown off by --

14 THE COURT: No, that -- I -- I think, based on
15 what I said before, if we're talking about the same case,
16 you may be ahead on it, but if you want to talk about it, go
17 ahead.

18 MR. WEINTRAUB: Well, the only point I want to
19 make on Amaro, because if I'm ahead, I should quit, but the
20 only point I want to make on Amaro is Amaro and the other
21 two cases cited in particular, I think it was the -- in the
22 Alper case, which was Judge Lifland and Judge Bernstein's
23 case, which was --

24 MAN: Keene.

25 MR. WEINTRAUB: Keene. In all three of those

1 cases, the activity that was being complained of in Keene
2 and in Alper, was really inappropriate transactions between
3 corporate -- related corporate companies that related to
4 looting and in Amaro, it was a pre-bankruptcy sale that was
5 going to be challenged as a fraudulent transfer for
6 inadequate price. All three of those Courts said, on the
7 filing date, those claims already existed, and therefore,
8 they became property of the Estate. I don't agree that
9 those claims should have become property of the Estate, but
10 the rationale of those cases were, the cause of action
11 existed on the filing date, and therefore, they became
12 property of the Estate. That's not what happened here, as
13 Mr. Steinberg pointed out, because the sale happened -- it
14 was a sale done by the Debtor in possession post-bankruptcy.
15 So, you don't have these claims ever becoming property of
16 the Estate. The other very important point to make is,
17 Judge Bernstein was the Judge in Keene, and he was also the
18 Judge in Grumman/Olsen. And in Grumman/Olsen --

19 THE COURT: And in Burton.

20 MR. WEINTRAUB: And in Burton, which Mr.
21 Weisfelner handled, ably so, I won't go back to that. When
22 confronted with the successor liability issue in
23 Grumman/Olsen, Judge Bernstein did not say, "Oh, remember
24 what I did in the Keene case? That was property of the
25 Estate, so that was released when I did the sale." He

1 didn't do that. What he did was the same analysis that Your
2 Honor did in this case. He relied on Chrysler and he relied
3 on TWA, and said that these claims are in personam claims
4 and they can be solved free and clear of, in Section 363(f).
5 I know this Court is probably not going to go there, but
6 there's nothing in the record that said back in July of 2009
7 that there was a 9019 motion to settle a successful
8 liability claim. That was not something that was stated on
9 the record, which would, of course, be another potential due
10 process violation if the result was going to be, "Oh, those
11 were released back in 2009 because they belong to the
12 Debtor." Unless you've got questions for me, Your Honor, I
13 think I have about exhausted what was in my outline when I
14 left the house this morning.

15 THE COURT: Okay, very good. Mr. Esserman?

16 MR. WEINTRAUB: Thank you.

17 MR. ESSERMAN: Sandy Esserman. Your Honor, I
18 realize that time is running short, so I'm just going to hit
19 a couple of hot points, if that's okay.

20 THE COURT: Sure.

21 MR. ESSERMAN: One thing that we have to be
22 cognizant of here is that we're not just looking at retained
23 liabilities versus assumed liabilities. We also have to
24 remember that we're also talking about new liabilities, and
25 new liabilities of new GM, and why is that important?

1 THE COURT: I understand instantly why that's
2 important. I think it would be helpful if you would explain
3 to me what kinds of claims you think are in that category.

4 MR. ESSERMAN: Well, we think a lot of the
5 complaints talk about new GM's liability as new GM, not as
6 an ignition switch. Let me give you some examples and some
7 counts, and how the factual allegations are weaved into
8 those complaints, because the complaints definitely talk
9 about, in substantial portion, new GM's post-sale conduct.
10 That is, the claims that would arise, for which people could
11 not file proof of claim, for which they had no liability,
12 old GM may have no liability. For instance there is a --
13 assertion of a violation of Deceptive Trade and Consumer
14 Protection statutes. Some examples of the conduct forming
15 the basis of these claims include the fact that new GM
16 touted its commitment to safety, product quality, putting
17 customers first, purporting to be a company that was focused
18 on the consumer and pushing accountability deeper into the
19 organization. The factual allegations go further that GM
20 knew about the defects plaguing the GM-branded vehicles.
21 They failed to take action, thereby causing consumers to
22 associate the GM brand with safety and reliability, and
23 causing Plaintiffs to overpay for or retain unsafe GM-
24 branded vehicles. The revelation of new GM's extensive
25 deceptions tarnished the brand further. There have been

1 complaints brought by the Orange County DA, the Arizona
2 Attorney General, which are a similar basis to these
3 complaints. There's also complaints for fraudulent
4 concealment, which talks about independent, new GM violation
5 of its independent duties, not old GM. Not those facts at
6 all. They allege that new GM concealed and suppressed
7 material facts about the quality of its vehicle and the GM
8 brand. The company's systematic devaluation of safety
9 issues, the ignition switch defect, many other defects
10 plaguing GM-branded vehicles. The consolidated complaints
11 also allege that new GM's duty to disclose orders from new
12 GM's superior, if not exclusive knowledge of the many
13 serious defects, and that it valued cost-cutting over
14 safety, took steps to insure its employees did not reveal
15 known safety defects to regulators or customers, and it goes
16 on from there.

17 There's one other count to highlight, and that's
18 sort of the unjust enrichment claim, also all based on new
19 GM's conduct, not conduct that occurred in 2009, before the
20 sale order or whatever, and how new GM benefitted from its
21 failure to make timely disclosure of the initial switch
22 defect in old GM cars as it is required to do. Plaintiffs
23 therefore overpaid, they suffered increased insurance
24 premiums, cost for alternative transportation, a few more
25 facts. New GM benefit was unjustly retained in light of the

1 fact that new GM was only able to reap this through a
2 campaign of deception, et cetera, et cetera. So, all of
3 this conduct occurred post-sale, and that is what is being
4 sought in the complaints, and that is what Your Honor is
5 sort of being asked --

6 THE COURT: Occurred post-sale, but dealing with
7 the value of vehicles manufactured by old GM.

8 MR. ESSERMAN: In part yes, in part no. There's
9 some of the -- there is a portion of the complaint that
10 deals with new GM vehicles, so --

11 THE COURT: Well, that, of course, is the much
12 easier part, Mr. Esserman.

13 MR. ESSERMAN: Of course.

14 THE COURT: Now, in the complaint, and I must say
15 that I've read everybody's briefs and cases more carefully
16 than I looked at that complaint. Does it slice and dice?
17 Does it set forth in different claims which involve old GM
18 vehicles and which involve new, or is that a task that's
19 imposed on me or Judge Furman or somebody, once I lay out
20 the rules to try to figure out whether it's prescribed by
21 such portions of the sale order that I'm prepared to keep
22 enforcing?

23 MR. ESSERMAN: I think it lays it out, and I think
24 you'll be able to imprint your order onto the complaint and
25 see. Of course, we think all of it will survive, but if you

1 --

2 THE COURT: Yeah, well, don't rule out the
3 possibility that any final opinion might not agree with both
4 sides in full.

5 MR. ESSERMAN: Well, and I understand that. You
6 know, which sort of also brings me to the order, and I know
7 what Your Honor -- well, I don't know anything, but what I
8 perceive is, to use Mr. Weintraub's analogy, if it was Judge
9 Esserman, I'd be struggling with how to reconcile some of
10 these provisions, how to reconcile the order, how to
11 reconcile the rights of people. And one section of the
12 order that has been overlooked, and I'm just going to
13 suggest it's worth some thought anyway, is that in the sale
14 decision on page 17 --

15 THE COURT: Of the slip opinion or -- but not in
16 the published opinion?

17 MR. ESSERMAN: Yeah, it's --

18 THE COURT: Well, I mean by published, I mean the
19 way it appears in the BR?

20 MR. ESSERMAN: You know, I don't have the BR site
21 here. It's the decision on Debtor's motion for approval of
22 its sale of assets to Vehicle Acquisition Holdings, LLC,
23 assumption and assignment of related executory contracts,
24 and entry into the UAW retiree settlement.

25 THE COURT: Yeah, we're talking about the same

1 opinion.

2 MR. ESSERMAN: Yeah, it's --

3 THE COURT: All I'm talking about is the way it
4 appears on ECF, you're saying, rather than in the BR.

5 MR. ESSERMAN: Yes.

6 THE COURT: Okay.

7 MR. ESSERMAN: And these are the findings of fact
8 in your decisions, which I'm going to quote to you, and
9 they're adopted in the sale order, which, of course, takes
10 precedence, but there's one statement in there, and when
11 you're wrestling with this, you can wrestle with this, what
12 you meant by this, that "Old GM will retain all liabilities,
13 except those defined in the MPA as assumed liabilities."
14 The assumed liabilities, that is, what new GM's going to
15 take, include, and I'm quoting, "product liability claims
16 arising out of products delivered at, or after the sale
17 transaction closes, paren the closing, close paren, and two,
18 the warranty and recall obligations of both old GM and new
19 GM." And I just sort of throw that out for something to be
20 massaged, I guess, but perhaps the sale order isn't all so
21 one-sided as new GM might have you believe, and perhaps it -
22 - I'm not sure what exactly was meant by that because there
23 are other, more specific issues dealing with those findings,
24 but that is a finding of this Court, which was adopted in
25 the sale order, which takes precedence. So, there may be

1 some room in there to manipulate something, should Your
2 Honor decide to do so, on the basis of the order --

3 THE COURT: Well, you don't exactly mean
4 manipulate it, as much as you mean, as to draw conclusions
5 from.

6 MR. ESSERMAN: Exactly. I withdraw that word.

7 THE COURT: Okay.

8 MR. ESSERMAN: And I probably already exceeded my
9 time, thank you.

10 THE COURT: All right, thank you very much. All
11 right, folks. Can you get in and out? Oh, Mr. Flaxer?

12 MR. FLAXER: Hi, Judge.

13 THE COURT: Okay, come on up, please. I thought
14 your principal concern was on (indiscernible) on the Court,
15 though.

16 MR. FLAXER: Yes, Your Honor, but your order
17 stated that that issue would not be addressed, which was
18 fine, but if we wanted to address, I would dispute it. I
19 will dispute the --

20 THE COURT: Okay, I'll just rely on your good
21 faith. Go ahead.

22 MR. FLAXER: Yes, Your Honor. I just wanted to,
23 very briefly, focusing particularly on the remedy issues.
24 We continue to believe that some discovery, as highlighted
25 by our disputed facts and our prior pleadings before the

1 Court may still be appropriate. We think that Your Honor's
2 determination on a remedy issue is inherently an equitable
3 decision. We also think, in this respect, that it's likely
4 that discovery would reveal, and I'll mention two primary
5 factual areas: one is actual knowledge of the ignition
6 switch defect at very high levels of GM's management, the
7 other is that GM deceived NHTSA in connection with its
8 responses to the so-called "death inquiries". We think that
9 if the Court had that factual record developed, as opposed
10 to, and what I still agree with designated counsel is a very
11 strong factual record based primarily on the DeLuca report,
12 but, as we've highlighted, the DeLuca report only goes so
13 far, and it seems to us, consciously avoids going after the
14 next level of senior level management knowledge. We think
15 if you had those facts before you, it would weigh very
16 heavily in favor of granting a remedy sought by designated
17 counsel for reasons including deterrence of future
18 concealments in connection with 363 sales.

19 THE COURT: And by that knowledge that you talked
20 about in the last sentence, you're talking about knowledge
21 by old GM management more senior than the 24 or 25 people
22 who were the subject of this (indiscernible)?

23 MR. FLAXER: Yes, Your Honor.

24 THE COURT: Okay.

25 MR. FLAXER: For example, we think it's likely --

1 we think it's very likely that the knowledge would go up to
2 the level of general counsel of North America and perhaps
3 higher, but you know, obviously that would take some
4 discovery to establish that, and we understand the concern
5 about delay, but in our estimation, in balancing the -- how
6 crucial it is that the remedy sought by designated counsel
7 be granted, that perhaps what Your Honor could do is rule in
8 favor of our side of the table on the due process issue and
9 authorize some discovery so Your Honor has a full, factual
10 record in order to make a fully informed decision, bearing
11 in mind that this is an equitable determination about
12 remedy, that Your Honor have a fully developed factual
13 record.

14 THE COURT: All right, thank you.

15 MR. FLAXER: Thank you, Your Honor.

16 THE COURT: Okay. By yelling out from the
17 audience, I guess, can you guys get back in an hour, or do
18 you need more time?

19 MAN: An hour would work.

20 MAN 2: An hour is fine with us, Your Honor.

21 THE COURT: Okay, then I show five after one on my
22 watch, it's a minute or two after that on that big clock on
23 the wall, see you guys back here in an hour.

24 MR. STEINBERG: Your Honor, I assume that when we
25 come back, it's the GUC Trust that will start?

1 THE COURT: I assume you're going to reply next,
2 or --

3 MR. STEINBERG: The GUC Trust hasn't spoken yet.
4 I'm not --

5 THE COURT: Oh, yeah. Is GUC Trust going to be --
6 Ms. Rubin, are you going to be weighing in on what I've
7 heard this morning?

8 MS. RUBIN: I fully expect to, Your Honor.

9 THE COURT: Okay. Then Ms. Rubin next, and then
10 you can reply after that, Mr. Steinberg. Now, especially
11 with the extent to which I've interrupted you guys, I'm not
12 going to prevent you from arguing anything, even if it's
13 beyond the original time limits, assuming you're not
14 filibustering or otherwise taxing my patience, but we still
15 have to quit at 3:15 today. If we're not done at that point
16 -- and of course, the resumption is going to be at 2:05, if
17 we're not done, then we're going to have to pick up tomorrow
18 morning. We're in recess.

19 MR. STEINBERG: Thanks.

20 (Court in recess at 1:05 PM)

21 THE CLERK: All rise.

22 THE COURT: Have seats, please. Okay, are we up
23 to Ms. Rubin?

24 MS. RUBIN: We are, Your Honor, and if I can help
25 it, I don't intend to take the full balance of my time

1 today.

2 THE COURT: Okay.

3 MS. RUBIN: But I do want to address a number of
4 the issues that you talked about with others today, and hope
5 that I can address some of the questions that you posed to
6 all of us as a group, as well.

7 THE COURT: Okay.

8 MS. RUBIN: Your Honor, I want to start from the
9 proposition that you started from this morning, which is
10 that you have been convinced, or at least you assume, where
11 we are right now, that there was enough knowledge at old GM
12 to have warranted a recall in 2009, prior to the sale. Your
13 Honor is clearly aware that the briefing that my client and
14 the participating unit holder submitted, took a different
15 tack, and the reason that we did that is because we wanted
16 to illustrate that even if everything that Mr. Steinberg and
17 his colleagues said was true, there was still a due process
18 violation here, or would be a due process violation here,
19 with respect to the groups of Plaintiffs that Mr.
20 Weisfelner, Mr. Esserman and Mr. Weintraub represent.

21 That having been said, let's start from the
22 proposition that Your Honor began with this morning and move
23 from there. The first, and most important reason we believe
24 that that the Plaintiff should be able to proceed against
25 new GM is because, as Mr. Weisfelner and others capably told

1 you, they have independent claims in both the pre-sale and
2 the post-sale complaint against new GM, that are predicated
3 on conduct of new GM, and for some reason, in their reply,
4 new GM seems to suggest that that's not true of the pre-sale
5 complaint, and I just want to illustrate one example of why
6 that is, in fact, the case. In paragraphs 1063 to 1079 of
7 the pre-sale complaint, the pre-sale Plaintiffs make a claim
8 under California's Unfair Competition law, and that claim is
9 predicated, in part but not in full, on the violation of GM,
10 sorry, new GM, on their violation to comply with the Safety
11 Act, and Your Honor, I want to underscore that that was a
12 knowing violation, by consenting to the order with NITSA.
13 What new GM essentially acknowledged is that they didn't
14 comply with that law, they did not provide NITSA with
15 knowledge within five days of determining there needed to be
16 a recall.

17 And from what I understand, Mr. Weisfelner's
18 clients' claim, for violation of the Unfair Competition law,
19 could be predicated on that in and of itself alone. Now,
20 there's another reason that these claims -- we discussed
21 whether or not these independent claims against new GM are
22 subject to the sale order, and Mr. Esserman pointed out to
23 you this morning a reason why they are not, based on the
24 findings of fact in the sale decision, and their
25 incorporation in full into the sale order.

1 Let me suggest to you another reason why, that I
2 think has eluded our discussion so far, and I'll refer Your
3 Honor to Section 2.3(b) of the Master Sale and Purchase
4 Agreement. That is the definition of retained liabilities,
5 and I'll just read it, in part. The definition of retained
6 liabilities starts with, "each seller acknowledges and
7 agrees that, pursuant to the terms and provisions of this
8 agreement, Purchaser shall not assume or become liable to
9 pay, perform or discharge, any liability of any Seller," and
10 let me pause there, Your Honor, because when we're talking
11 about retained liabilities, it pertains to the liability of
12 a Seller. Now, Mr. Steinberg wants to suggest that any
13 liabilities that have to do with private rights of action
14 for failures, for example, to comply with recall
15 obligations, are not assumed liabilities, and therefore, by
16 definition, must be retained. Respectfully, I'll disagree,
17 and agree with the Plaintiffs that it's not a binary
18 universe of assumed, retained and nothing else. New GM
19 covenanted, under Section 6.15(a), that it would comply with
20 all of the Federal recall-related laws and regulations
21 applicable to old GM-manufactured, designed or sold
22 vehicles.

23 THE COURT: That's in the sale agreement?

24 MS. RUBIN: That is in the sale agreement, Your
25 Honor.

1 THE COURT: What section is that, by the way?

2 MS. RUBIN: It's 6.15(a) and it's addressed in our
3 briefing as well, Your Honor.

4 THE COURT: I'm well aware of the point, I would
5 just -- wanted to see the citation, too.

6 MS. RUBIN: So, Your Honor, it would be our
7 position that, having undertaken that covenant, that is the
8 independent duty that Mr. Steinberg insists that his client
9 does not have, irrespective of the wording of the sale
10 order, they agreed to comply with those recall laws in
11 respect of old vehicles. Whether or not the sale order goes
12 beyond that in other respects, and maybe goes too far, is
13 another issue entirely, but at least in terms of the sale
14 agreement itself, the retained liabilities are liabilities
15 of any Seller. I don't hear anybody suggesting, or they
16 shouldn't suggest, that old GM, or the old GM bankrupt
17 estate through the GUC Trust, should somehow be liable for
18 the knowingness conduct of new GM and its failure to
19 disclose to NITSA, disclose to the driving public, to
20 disclose to this Court, and to disclose to anyone at all,
21 that these cars were subject to a safety defect that rose to
22 the level that it warranted a recall.

23 The other thing that -- one other thing that we
24 would say, Your Honor, is, in terms of why the Plaintiff's
25 claims should be allowed to go forward, let me identify

1 another group of the Plaintiffs. I believe Mr. Weisfelner
2 is the one who spoke to you at length about the used car
3 purchasers here, and whether or not their claims are subject
4 to the sale order. It's hard for us to see, under the
5 Grumman case, which as Your Honor knows, interprets
6 Chateaugay, how the used car purchasers here could ever have
7 been subject to the sale order and injunction. None of
8 those people had any pre-sale relationship or contact with
9 old GM. Suddenly, they were not aware at the point in time
10 of their sale that their cars were subject to the serious
11 safety defect of which we're all now aware, and it's hard
12 for us to see how the analysis in the Grumman case is any
13 different than that which should be applied to used car
14 purchasers, who are a class of Plaintiffs implicated by the
15 post-sale consolidated complaint.

16 Now, there was some discussion this morning about
17 the Burton decision, which Your Honor referred to as the
18 Chrysler decision by Judge Bernstein, and to the extent that
19 Your Honor has questions about why these used car purchasers
20 in this situation should be treated any differently than the
21 Burton Plaintiffs, let me try to address that, if I may.

22 First and foremost, the Burton case involved a
23 recurring fuel spit-back problem that had already resulted
24 in two to three recalls prior to Plaintiffs bringing forth
25 claims in that instance. Here, we have a warranty in the

1 sale agreement by old GM, that there had been no material
2 recalls since 2007. We're not dealing with a factual
3 situation in which anybody who drove one of the vehicles,
4 we'll call them the subject vehicles, that are the subject
5 of this proceeding, nobody is suggesting that drivers should
6 have been on notice of the ignition switch defect by virtue
7 of anything that happened before, as was the case in Burton.

8 Now, new GM is very fond of quoting to Your Honor
9 a particular sentence from the Burton decision in which
10 Judge Bernstein, and I'm sure I'll mangle this somehow, says
11 that anyone who drives a car should reasonably contemplate
12 that their car will need to be repaired. Again, the end of
13 that sentence, which new GM doesn't quote for you is,
14 "especially whereas here there have already been two to
15 three recalls involving the same problem, and involving some
16 of the same vehicles," but be that as it may, there's
17 another distinction here that I think is a more fundamental
18 and important one.

19 The claims at issue here are not fundamentally
20 about repairs. The Burton case is one in which the
21 Plaintiffs, who characterized themselves as future claimants
22 and with which Judge Bernstein disagreed, their claims were
23 Duty to Warn claims and failures to honor warranties.
24 Fundamentally, they were upset that their cars weren't being
25 repaired. That's not really the gravamen of the Plaintiff's

1 complaints and the consolidated complaints here. What are
2 they really talking about, Your Honor? They're saying,
3 there has been such a widespread erosion of GM's reputation
4 for quality, such that all of their vehicles have suffered
5 economic loss, and to the extent that they are also alleging
6 damages for economic losses associated with repairs, again,
7 I would submit that those are not the sort of repair-related
8 claims that a driver of these vehicles could have or should
9 have anticipated. They are claims for things like childcare
10 expenses associated with all of the time necessary to get
11 their cars repaired, their lost wages, their rental car
12 expenses. Your Honor is well aware that there are a number
13 of people who said, "Until GM is able to repair my car
14 consistent with the ignition switch recall, I'm not driving
15 that car, because I know, based on the information that's
16 come out through Feinberg Compensation Fund, that GM has at
17 least admitted that 50+ people died, and has awarded awards
18 under the Feinberg Compensation protocol, to at least 128
19 people." That being the case, there are people that Mr.
20 Weisfelner and Mr. Esserman represent who say, "I'm not
21 going to drive my car and GM should be liable for the cost
22 of my rental car expenses during that period of time, until
23 my car is 100 percent safe to drive."

24 Now, Your Honor, putting aside the question of
25 whether these Plaintiffs have independent claims against new

1 GM, or whether there are future claims on behalf of the used
2 car purchasers that are more akin to the claims in the
3 Grumman/Olsen case, the biggest issue here is obviously
4 whether or not the pre-sale economic loss Plaintiffs
5 suffered a due process violation. And you see in the
6 briefing that there are starkly different visions of the
7 notice that should have been afforded to those claimants.

8 Let me submit this. If Your Honor can accept that
9 old GM knew enough that they should have recalled the
10 subject vehicles, the notice that was given was never
11 enough, even for the folks that Mr. Weintraub represents,
12 and here's why. Last year, in the DPWN case that went up to
13 the Second Circuit, the Court set forth the standard for
14 evaluating the claims of those who otherwise would be barred
15 by a bankruptcy order. And the Court essentially said, it's
16 a two-part test. The first thing you have to do is look at
17 what the claimants knew or should have known with reasonable
18 diligence, and if the claimant gets across that threshold,
19 the second part of the inquiry is to ask what "the Debtor
20 knew or should have known of the potential liability, such
21 that it should have provided the claimant with notice of his
22 or her potential claim."

23 Whether or not the folks that Mr. Weisfelner and
24 Mr. Esserman and Mr. Weintraub represent are known
25 Creditors, it is indisputable that old GM knew enough that

1 it should have afforded them more notice under the DPWN
2 test. And Your Honor shouldn't take my word for the fact
3 that the DPWN test now guides evaluations of due process not
4 just in a post-discharge context, but across all bankruptcy
5 contexts, Your Honor may be aware that Judge Gropper issued
6 an opinion in the Direct Access bankruptcy last month on
7 January 6th, the Westlaw site is 2015 WL 94556, and in doing
8 so, Judge Gropper was asked to pass on whether or not a
9 claimant could file a late Proof of Claim after a
10 confirmation order. Judge Gropper writes as follows, Your
11 Honor: "In DPWN holdings, the Second Circuit recently set
12 forth the showing that a party must make, in order to obtain
13 the right to pursue a claim that otherwise would be barred
14 by virtue of a Debtor's bankruptcy" It wasn't conditioned
15 on what kind of case we were talking about or what stage in
16 the bankruptcy we were at. Judge Gropper interpreted the
17 DPWN case to be the guiding analysis for any time someone
18 comes before this Court or a District Court and says, "I
19 have a claim," and the Defendant says, "No, no, no, you're
20 barred by a sale order and an injunction," or, "You're
21 barred by some other order in bankruptcy."

22 So under that analysis, Your Honor, the DPWN
23 analysis, we would respectfully submit that old GM knew or
24 should have known of the potential claims that folks like
25 Mr. Weisfelner's clients would have had, even if they didn't

1 have a bunch of lawsuits before them, even if they didn't
2 make the list of Creditors, even if they didn't appear on
3 the general ledger. The had sufficient knowledge within the
4 company, based on their books and records, construed more
5 broadly, that they should have provided notice of the
6 potential liability before the sale.

7 Now, Your Honor asked an inform question earlier
8 today, which was, "What should that notice have looked
9 like?" And I think you've heard from Mr. Weintraub and
10 others about what that might have looked like. Let me
11 underscore Mr. Weintraub's presentation and say, we believe
12 that the right notice here would have looked like the
13 Chemtura situation, and respectfully, while Your Honor
14 identifies that as a situation in which Your Honor approved
15 best practices, and certainly, I'll agree that Judge Furman
16 in affirming that, agreed that maybe that wasn't what was
17 constitutionally mandated under the facts of that case, I
18 think the type of notice provided there is constitutionally
19 mandated in this case. You have a situation where on the
20 factual record, Mr. Weisfelner has already convinced Your
21 Honor that old GM knew enough that it should have issued a
22 recall in respect of the subject vehicles. On those facts,
23 why it's not the case that the publication notice should
24 have said, "There is a safety defect of a serious dimension
25 in these makes and models of vehicles, and if you believe

1 you have been injured by that, now is the time to come
2 forward. There will be a hearing about the sale." That is
3 essentially what was provided in the Chemtura case where the
4 manufacturer understood that a chemical that it produced --

5 THE COURT: Chemtura was a claims case, that the
6 people worked in factories where diacetyl was used.

7 MS. RUBIN: Yes, Your Honor.

8 THE COURT: It wasn't a 363 case.

9 MS. RUBIN: Well, that's true, Your Honor, it
10 wasn't a 363 case, but respectfully, Your Honor, courts in
11 this District and Circuit and others, borrow, with respect
12 to what notice is constitutionally mandated, from context to
13 context all the time.

14 THE COURT: Yes, but you would agree, I take it
15 that, Mullaney talks baby talk about the need to look at the
16 facts and circumstances.

17 MS. RUBIN: Sure, and Your Honor, I'd also agree
18 that the facts --

19 THE COURT: As do the other cases, the Second
20 Circuit cases such as Drexel Burnham implementing the
21 Mullaney.

22 MS. RUBIN: Sure, but Your Honor, I would also
23 say, that in talking about 363 cases or otherwise, the
24 fundamentals of notice, the cornerstones of notice, or not
25 only notice of one's claim, but the opportunity to be heard,

1 and that doesn't change from context to context, and if we
2 are going to follow the dictates of Mullaney and talk about
3 the facts and circumstances of this case, I think if Your
4 Honor is willing to find that old GM knew enough that it
5 should have recalled the vehicles, certainly it knew enough
6 in those circumstances that it should have incorporated in a
7 publication notice, enough information to put people like
8 Mr. Weisfelner's clients, that if they believed they had a
9 claim, now was the time to come forward. They didn't have
10 to necessarily say, "If you believe you've suffered an
11 economic loss or diminution of value in your car or lost
12 wages," or any of that, that's not the claim-specific notice
13 that we're talking about. But they should have apprised
14 people in the Plaintiffs' position of the facts and
15 circumstances that underlie their case, that there was a
16 serious ignition switch defect that ran throughout the
17 subject vehicles, that was serious enough to warrant a
18 recall, and therefore, anyone who believes that they have
19 been injured thereby, should come forth and file a claim.

20 Now, Your Honor, there has been a lot made out of
21 the fact that 363 is sort of a separate situation, and I
22 think Your Honor just alluded to it, that in discharge cases
23 or confirmation cases, maybe notice doesn't mean what it
24 should mean in a 363 case. But I'll have your -- I'll say
25 for Your Honor's sake, DPWN, at the District Court level,

1 which was a known Creditor case, right, DHL didn't know that
2 it has an antitrust claim against United Airlines. They
3 certainly knew that they were a Creditor, they were
4 certainly apprised of the bankruptcy, and deciding what
5 notice is due to DHL, what did the Eastern District -- how
6 did the Eastern District make that decision? Well, they
7 borrowed from the Grumman case, which is, in fact, a 363
8 case.

9 Similarly, in the Schwinn case in the Northern
10 District of Illinois, a 363 case involving a purchaser of an
11 exercise bike in 1979, whose grandson is not injured until
12 well after the bankruptcy in the 90s, what does that case
13 do? It borrows from the Chemtron case in the Third Circuit,
14 which again, is a discharge case. So, I would submit to
15 Your Honor that what is fundamentally required for notice
16 before depriving someone of a property interest, the facts
17 and circumstances of the cases might change in terms of
18 dictating what form of notice is required, but the content
19 has to be informed by a larger body of case law that is
20 transferrable from one context to the other.

21 It's also true that the idea that none of the
22 Plaintiff's property interests here were affected is sort of
23 a preposterous one, right? And to the extent that new GM
24 tries to distinguish some of the 363 cases outside this
25 Circuit by saying, "Well, those cases involve property

1 interests that were unique and couldn't have been reduced to
2 money," that's actually not true. First of all, those cases
3 were all decided on grounds other than the type of interest
4 invoked, and Rule 60(b) was considered in all of them.

5 I'll talk about the poly --

6 THE COURT: Wait, time out. You said 60(b) was
7 considered?

8 MS. RUBIN: It was considered, and in each of
9 those cases, Polycel, Metzger, and Compak, after referring
10 to Rule 60(b), each of the courts nonetheless held that the
11 claimant before it should be exempt from the sale order, on
12 the basis that the due process rights were violated. I'll
13 quote to you, Your Honor from the Metzger case, where, after
14 considering Rule 60(b), for example, the Court said, "The
15 Court has some flexibility in creating a remedy here, and
16 need not and will not find the entire sale void." But
17 nonetheless, the Court held that it would find that the sale
18 was void as to the claimant before it.

19 THE COURT: Well, there was no question that
20 Arthur Weissbrodt said that, but I don't have a memory of
21 him discussing the criteria for granting 60(b) relief, and
22 if you say that he mentioned it, and I'm not (indiscernible)
23 to Ms. Rubin, but there was not a material discussion of
24 60(b), was there?

25 MS. RUBIN: Your Honor, I don't have the case

1 right in front of me and I'm unable to answer that question
2 directly, but my recollection is that in at least two of
3 these three cases, there is a discussion by the Defendant
4 that 60(b) only allows for voiding the entire sale order or
5 providing no relief, and in each of those cases, there's a
6 rejection, either implicitly or explicitly, of that theory.
7 So, for example, in the Compaq case -- you know, the other
8 thing I would say, Your Honor, is that certain of these
9 Courts say that notwithstanding Rule 60(b), Rule 60(b) is
10 only one way of getting there. So, for example, in the
11 Compaq case, the Court says, "There's not a Rule 60(b)
12 motion before me, but sua sponte, I can characterize the
13 relief that this claimant is asking for as a 60(b) motion,
14 or alternatively, I can see this as a motion for relief from
15 the sale order." That's an implicit recognition that 60(b)
16 is not the only vehicle by which you can remediate a due
17 process violation. So, respectfully, GM's assertion that
18 the Plaintiffs here have to conform and shoehorn their
19 arguments into a 60(b) analysis in order to prevail is
20 simply not the case. You have an implicit recognition in
21 the Compaq case that that's true, and more importantly, in
22 this District, let me refer Your Honor to the Lehman
23 Brothers decision that new GM cites in its brief at 2014 WL
24 7229473. Now, Judge Buchwald in that situation determined
25 that the Creditor, who was making arguments before her, in

1 fact didn't qualify as a Creditor at all, but in clarifying
2 the narrowness of her holdings, she said as follows, Your
3 Honor: "We do not decide to question whether a person with a
4 cognizable property interest may attack a final free and
5 clear sale order in the absence of notice," and then,
6 following that immediately with this sentence: "Nor do we
7 decide whether the lack of notice could be grounds..." there
8 is an ellipses here, "for relief from a sale order under
9 Rule 60(b)." So, you have a District Court Judge in this
10 District, implicitly recognizing that a due process claim,
11 meaning, I didn't get notice of the way in which my property
12 interests would be affected here, could be different from a
13 Rule 60(b) motion.

14 THE COURT: I'm not sure if I heard you right. I
15 thought you preceded each of those two sentences by "We do
16 not decide that."

17 MS. RUBIN: And I did, Your Honor, but I still see
18 the case as standing for a recognition, as a District Court
19 Judge in this District, recognizing that these are two
20 alternative ways of getting to the same place. I'll
21 recognize that that's dicta. Judge Buchwald didn't reach
22 those issues in her decision, and she's very clear about
23 that, but notwithstanding that, in clarifying to the larger
24 community reading her decision what she is and is not
25 deciding, she is saying expressly, "I see these things as

1 possibly two different avenues for relief," and I think it
2 just underscores the fact that in the Compaq decision, for
3 example, the Court says the same thing. "I don't have a
4 Rule 60(b) motion before me. I can sua sponte interpret the
5 arguments that are being made before me as a 60(b) motion,
6 or alternatively, I can grant relief from the sale order."
7 That doesn't sound to me like the musings of a Judge who
8 believes that 60(b) is the only vehicle by which someone who
9 has a due process argument can seek relief from the sale
10 order.

11 Your Honor, I'll move on to talk about remedy, and
12 I'll note that the primary cases on which new GM depends are
13 the Edwards case, and they also place a lot of emphasis on
14 the Paris case, which hasn't been discussed directly by
15 name, but the general principle has been alluded to a lot
16 here, that's the case --

17 THE COURT: Paris?

18 MS. RUBIN: Yes.

19 THE COURT: Mr. Weisfelner had mentioned Paris.

20 MS. RUBIN: Well, I apologize to Mr. Weisfelner
21 for not hearing that. To the extent that the Court in Paris
22 is saying, "Your interests are not affected here because you
23 have a bunch of assets that can be converted and all
24 Creditors will have access to that." Your Honor, that may be
25 fine and well if we were here four years ago, or five years

1 ago, but that's not where we are now, and I think to not
2 appreciate the realities of where the GUC Trust finds itself
3 would be a disservice to everyone, right? We have a
4 situation here where the GUC Trust has distributed 90 plus
5 percent of distributable assets. We are three plus years
6 post-confirmation. All of the remaining resources of the
7 GUC Trust have been reserved for express purposes as Your
8 Honor knows, we filed a quarterly GUC Trust report last
9 week. There is literally nothing left right now for the
10 Plaintiffs here, and so to not -- if we're going to consider
11 who would be prejudiced by a remedy here or consider a
12 larger context of prejudice with respect to the remedy, I
13 think that has to be considered, too.

14 The final thing that I'll say, Your Honor, is the
15 notion that prejudice is somehow a required element of a due
16 process violation is creative, but not sustained by the case
17 law. To the extent that old GM siphoned numbers --

18 THE COURT: Time out. Before you go too far, Ms.
19 Rubin --

20 MS. RUBIN: Sure.

21 THE COURT: -- I need to dust off with you the
22 colloquy I had with Mr. Weisfelner, because I would agree in
23 a heartbeat that you didn't make the supplemental
24 distribution to your constituency last year in the dead of
25 night, but you're saying -- you're talking about hardship,

1 presumably to the economic loss Plaintiffs, or maybe Mr.
2 Weintraub's people or both. At the same time that your
3 folks were the beneficiaries of Mr. Weisfelner's guys
4 decision for admitted strategic reasons, not to try to tap
5 those funds. So you're trying to exploit the very situation
6 for which your guys were the beneficiary.

7 MS. RUBIN: I don't believe that it's an attempted
8 exploitation at all, Your Honor.

9 THE COURT: Well, I'm not accusing you of evil --

10 MS. RUBIN: I respectfully disagree, if I can.

11 THE COURT: I'm accusing you of representing a
12 client --

13 MS. RUBIN: No.

14 THE COURT: -- but isn't that the bottom line?

15 MS. RUBIN: No, Your Honor, it's not, and here's
16 why. Your Honor engaged in a colloquy earlier with Mr.
17 Weisfelner, well first of all, to the extent that you
18 engaged in the colloquy earlier with Mr. Weisfelner also
19 about the efficacy of the bar date notice, correct? It may
20 be that the bar date notice was not effective as to certain
21 of these Plaintiffs, but the sale notice wasn't effective as
22 to them either, and they had a choice to make at the outset.
23 It's undisputed that they didn't know about the defect in
24 the subject vehicles until around February of 2014, but at
25 that point in time, they made a choice, and they made a

1 choice to go after new GM. They never once filed a claim or
2 sought to file a late proof of claim against the GUC Trust.

3 When there were the initial motions to enforce a
4 few months later, and we came before this Court, the
5 Plaintiffs filed an objection, they filed an adversary
6 proceeding complaint, those issues were not raised there
7 either, and when we first came before Your Honor, let's
8 rehash how the GUC Trust came to be a party here. It wasn't
9 on motion or any suggestion by the Plaintiffs. It was on
10 suggestion by new GM, who said the Plaintiffs should be
11 forced and shoehorned into going after the GUC Trust. But
12 we don't believe that the Plaintiffs should have to do that.
13 We believe that the Plaintiffs' due process rights were
14 violated, and so in making that distribution, I wouldn't
15 characterize it as an exploitation at all. I would say that
16 my client was well within its rights to distribute assets to
17 its existing beneficiaries, consistent with its fiduciary
18 duties and the documents that govern it.

19 Your Honor, if I can return to prejudice?

20 THE COURT: Yeah, go ahead.

21 MS. RUBIN: The notion that prejudice is a
22 required element of a due process violation here, I think,
23 is a fiction, and in advancing that argument, new GM relies
24 on two different strands of cases: one are cases in which,
25 despite a notice defect, the claimants still have an

1 opportunity to be heard, and that's particularly true of the
2 cases that they cite within this District. The Parker case,
3 I think, is a paradigmatic example of that. The Plaintiff
4 in that case came forward and said they were deprived of
5 their due process rights, but Your Honor found that,
6 notwithstanding that, the guy cross-examined two of the
7 three witnesses during the sale hearing, received ample
8 discovery. There was no due process violation because he
9 had an opportunity to be heard. That certainly was not the
10 case with respect to any of the Plaintiffs here, against
11 whom the notice couldn't have possibly been effective,
12 because to just get the notice without notice of their claim
13 is, as Mr. Weisfelner recognized in the Waterman case, no
14 different than being apprised of your claim and not being
15 apprised of the bankruptcy.

16 The other cases that they cite are entirely far of
17 field from bankruptcy altogether. Most of them involve
18 procedural irregularities, like failure to enter a
19 substitution of counsel order, and notwithstanding that, the
20 new counsel still gets to be heard, or listing the wrong
21 statute in an administrative proceeding on the cover, where
22 everybody knows what's really at issue. That's certainly
23 not the case in which we found ourselves, so it takes a lot
24 of creativity to cleave onto the due process standard in
25 this Circuit, some prejudice standard. The Manville case

1 and the Cope case that Your Honor referred to earlier, we
2 understand and appreciate those aren't 363 cases. But to
3 conclude, Your Honor, we would suggest that those should be
4 your guiding principles. Those are recognitions by the
5 Second Circuit that in a bankruptcy situation, no party can
6 be deprived of a property interest without adequate notice
7 of their claim.

8 Everybody understands, here, that that's not what
9 happened, and to the extent that Your Honor is willing to
10 find on this stipulated factual record, that old GM had
11 sufficient knowledge that it should have recalled the
12 vehicles, it should also be the case that they had
13 sufficient knowledge to put into a publication notice, if
14 not actual mailed notice to all of the people that Mr.
15 Weisfelner and Mr. Esserman and Mr. Weintraub represent. It
16 should have put into that notice greater content to afford
17 people a better and more complete, and consistent with due
18 process, a constitutional understanding of what their claims
19 are. And with that, Your Honor, I'll rest.

20 THE COURT: All right, thank you. Okay, Mr.
21 Steinberg?

22 MR. STEINBERG: Your Honor, do we have a stop at a
23 quarter after three today?

24 THE COURT: Yes.

25 MR. STEINBERG: I'm not sure if I'll finish with

1 my reply, but I've spoken to the other counsel and I think
2 they all want to reply as well too, and I'm wondering
3 whether we should do all of our replies tomorrow morning.
4 We could potentially do equitable mootness today, if you
5 wanted to take it out of order if everybody else was
6 prepared to do that, but I'm not sure whether I'll finish,
7 and I don't necessarily think it's fair that they will have
8 overnight to prepare for my replies.

9 THE COURT: Well, I certainly see the merit of
10 your suggestion of having the remainder, this topic, done at
11 the start tomorrow. How much equitable mootness is mainly
12 between Ms. Rubin and you?

13 MR. STEINBERG: No, Your Honor, I think the entire
14 equitable mootness argument is a half hour and I think I
15 have five minutes, I think Mr. Weisfelner has five minutes -
16 -

17 THE COURT: Yeah, of course, it's mainly Ms.
18 Rubin's issue.

19 MR. STEINBERG: Oh.

20 MS. NEWMAN: Actually, Your Honor, it's not, it's
21 --

22 MR. STEINBERG: It's the unit holder.

23 THE COURT: Yes, but with Akin Gump.

24 MS. NEWMAN: Yes.

25 THE COURT: You're her ally.

1 MS. NEWMAN: I am. I (indiscernible).

2 THE COURT: Okay, you're playing the role of Mr.
3 Golden?

4 MS. NEWMAN: Yes, Your Honor.

5 THE COURT: All right. Can we really, really get
6 this done in 35 minutes?

7 MS. NEWMAN: Your Honor, I think we would prefer
8 to start that tomorrow, keep the order that's contemplated
9 in the schedule and start that tomorrow because we're
10 concerned that, to the extent that Your Honor has questions,
11 we may need more time.

12 THE COURT: Are you guys available early tomorrow
13 as you were today?

14 MR. STEINBERG: Yes.

15 MS. NEWMAN: Yes.

16 THE COURT: All right, let's do this starting at
17 9:00am tomorrow.

18 MR. STEINBERG: Thank you.

19 MS. NEWMAN: Thank you, Your Honor.

20 THE COURT: But therefore, what I want to do is
21 back to the principle arguments, which is what you
22 (indiscernible), Mr. Steinberg, and Mr. Weisfelner, you're
23 looking for a brief (indiscernible)?

24 MR. WEISFELNER: Correct, Your Honor.

25 MS. RUBIN: And Your Honor, I have also reserved

1 five minutes if Your Honor can (indiscernible) reserve
2 (indiscernible).

3 THE COURT: Okay. In which case, the
4 (indiscernible) Plaintiffs, of course, have to be limited to
5 new stuff that Mr. Steinberg says tomorrow morning, but with
6 that said, we'll pick up at 9:00 tomorrow. Let's notify the
7 marshals accordingly. And CourtCall if you are listening
8 in, get yourself down there before 9:00. Okay, we'll recess
9 until 9:00.

10 MR. WEISFELNER: Your Honor, do you know whether
11 or not it would be safe to leave our binders and --

12 THE COURT: I'll tell you what I always tell
13 people in these circumstances, Mr. Weisfelner. You've got
14 my permission to --

15 (Whereupon these proceedings were concluded at
16 2:44 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions

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Date: February 19, 2015

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